REPORT OF THE TASK FORCE ON THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS

JULY, 1992

Ontario

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June 22, 1992

The Honourable Ruth Grier
Minister of the Environment
135 St. Clair Avenue West
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Dear Mrs. Grier:

Your Task Force on the Ontario Environmental Bill of Rights has the honour to submit its report and proposed Environmental Bill of Rights.

Yours very truly,

Richard Dicerni
Deputy Minister, Co-chair

Yours very truly,

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Task Force on the Ontario Environmental Bill of Rights

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Introduction

The Task Force on the Ontario Environmental Bill of Rights worked between September of 1991 and June of 1992 to develop a unanimous consensus on the content of an Environmental Bill of Rights for Ontario. This report contains a detailed discussion of the recommendations and a proposed Environmental Bill of Rights. In order to have a better appreciation of the approach used by the Task Force and for the recommendations that have been made, an overview of the report and proposed Environmental Bill of Rights may be of assistance.

The starting point for the Task Force's discussions about an Environmental Bill of Rights was an acceptance of the obvious public concern about protecting the environment. While a variety of protections are already available in the law of Ontario it was thought that these protections were not sufficient to meet the needs of a modern society such as that which we now enjoy in Ontario. Other jurisdictions such as the Yukon, the Northwest Territories, and the States of Michigan, Minnesota and Connecticut, have enacted "Environmental Bills of Rights". Saskatchewan is now considering enactment of an Environmental Bill of Rights which it recently introduced for first reading in its Legislature. The approaches, however, vary significantly. The Task Force, in its search for an Environmental Bill of Rights for Ontario, sought to develop legislative protection that met the unique needs of our province.

Over the last decade, public concern about the environment has become a top priority as society assesses the harm to the environment that has occurred. Global warming, ozone depletion, soil contamination, acid rain, contaminated waterways and other incidents of environmental harm, regularly appear in the news and contribute to public worry about our collective responsibility for the protection of our environment.

As a result, public confidence has been shaken both in the sustainability of the environment and in our ability to protect it. Individual citizens are left with the uneasy feeling that they are unable to affect "the system" that makes important environmental decisions on a daily basis.

During the Task Force's deliberations and consultations members acknowledged a growing lack of confidence in government to meet either the needs of those who seek to protect the environment or the needs of those who, while caring about the environment, must carry on business in an increasingly competitive world.

In approaching these issues and the shape of an Environmental Bill of Rights for Ontario, the Task Force addressed some basic questions:

1. Which "environment" should an Environmental Bill of Rights protect?
2. Who has primary responsibility for the protection of the environment?
3. How can the public participate in environmental decision-making that affects their community and their province in a meaningful way?
4. What can be done to ensure that those who use and affect our environment do so responsibly and with a view to its integrity and sustainability?

The Task Force considered the objective of an Environmental Bill of Rights to be the protection of the natural environment. When the word "environment" is used throughout this report, it includes air, land and water, plant life, animal life and ecological systems.

The Task Force considered the question of responsibility for the environment and concluded that the public and the government share responsibility for environmental protection. However, the government, by virtue of the role that it plays in regulating life in Ontario, and by virtue of our democratic traditions, must have primary responsibility for protection of the environment and our public resources.

In designing an Environmental Bill of Rights, the issue then became, how to provide the public with the means to hold government accountable for the decisions it makes in meeting its primary responsibility for environmental protection. With greater accountability, public confidence in the quality of government decision-making should increase.

The Task Force, in this report and in the proposed Environmental Bill of Rights, has developed three main methods for providing the opportunity for government accountability for environmental decision-making. These three methods involve:

- increased public participation in significant environmental decision-making by government,
- increased access to the justice system to provide the public with a role in protecting the environment and public resources, and
- increased protection for employees who report environmental harm in their workplace.

Increased government accountability for environmental decision-making, however, is only part of the potential value of an Environmental Bill of Rights. The Task Force also recommends that the very purposes of the Environmental Bill of Rights be integrated in environmental decision-making by government.

The purpose of the Environmental Bill of Rights, the Task Force concluded, is to protect and conserve and, where reasonable, restore the integrity of the natural environment and to provide a sustainable environment for the benefit of present and future generations. This purpose should include prevention, reduction and elimination of the use, generation and release of pollutants which threaten the integrity of the environment, and should also include protection and conservation of biological, ecological and genetic diversity.

Protection, conservation and the wise management of natural resources, including the Province's wildlife, along with the identification and protection of ecologically sensitive areas or processes are also important the purposes of the Environmental Bill of Rights. The preamble and purposes are discussed in Chapter 3(A).

But how, the Task Force asked, can these purposes be integrated with the existing social and economic and scientific considerations already being used in environmental decision-making by government?

To achieve integration of the purposes of the Environmental Bill of Rights, the Task Force recommends a three-step process. As a first step, each Ministry that makes significant environmental decisions should develop a draft statement - a Statement of Environmental Values - that applies the Environmental Bill of Rights' purposes to that Ministry's environmental decision-making and describes how these purposes can be integrated with social, economic and scientific considerations. The second step would have this "Statement of Environmental Values" shared with the public and interested groups for comment.

Once the Statement of Environmental Values for a particular Ministry has been designed, it should then be used to shape the development of significant environmental policies, regulations and instruments by that Ministry.

The Task Force envisages the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Northern Development and Mines, the Ministry of Agriculture and Food, and others, developing individual Statements of Environmental Values over the next several years. It is expected that this process will create a new attitude within government for environmental decision-making - an attitude that mandates a consideration of the purposes of the Environmental Bill of Rights, along with other factors, when making decisions that will affect the environment.

Accountability for the environmental decisions, once made, is a critically important part of the Task Force's recommendations. Accountability can be achieved if the public has the opportunity to participate in the decision-making through notice of the government's intention to make a decision, an opportunity to comment on or participate in the making of that decision, and notice of the decision once it has been made. The Task Force recommends, as a third step, that this transparency in government decision-making with respect to the environment be achieved through the establishment of an "Environmental Registry".

The Environmental Registry would have three main components: an environmental policy component, an environmental regulation component and an environmental instrument component. Through this Registry significant environmental decisions would flow. The public would receive notice of the government's intention to make a decision, be given a specific and timely opportunity to comment on or participate in the decision, and would then receive notice of the decision that had been made. It is this, the Task Force feels, that will provide government accountability. Through this process the public will be able to compare a particular Ministry's Statement of Environmental Values with significant environmental decisions as they are actually made. Over time, the public will judge whether a particular government has infused its decision-making with the purposes of the Environmental Bill of Rights. Chapter 3 describes in detail the above process involving Statements of Environmental Values, the Environmental Registry System and a system for public participation.

The Task Force recommends that accountability for significant environmental decision-making may also be achieved by providing the public with the specific standardized procedure by which they may trigger an investigation by government of suspected environmental harm. The Task Force also recommends that the public have the power to formally request that the government consider the establishment of new policies, regulations or instruments where needed to protect the environment. In addition, since the

Environmental Bill of Rights will apply essentially to policies, regulations and instruments proposed after the Environmental Bill of Rights is in place, this ability to make an application for review will give the public an opportunity to urge government into a review of its existing environmental policies, regulations and instruments. This, over time, should infuse all government decisions with respect to the environment with each Ministry's Statement of Environmental Values and therefore the Environmental Bill of Rights' purposes. The ability to apply for an investigation and apply for a review are discussed in Chapter 3 (B)(iii) and (iv).

Protection of the environment by government entails a special responsibility to protect the Province's public resources which the government essentially holds for the benefit of the residents of Ontario. These resources include air, public lands and water, including groundwater, as well as plant and animal life associated with them. This protection is already provided, in part, through existing legislation but the Task Force recommends specific empowerment of the residents of Ontario to protect public resources in the courts when the government does not meet its responsibility.

The Task Force recommends that where a resident has requested an investigation by government of suspected environmental harm to a public resource, and the government has not provided a reasonable response, individual residents should be able to commence proceedings in our courts to obtain an injunction to stop the harm that is occurring or is imminent, and to obtain an order from the court that interested parties negotiate a plan to restore the public resource. This new cause of action for environmental harm to a public resource and other suggestions for improving access to the courts for protection of the environment, are contained in Chapter 3(C).

Accountability should not extend just to government in its environmental decisions. Employees who witness environmental harm in their workplace offer a valuable front line defence against harm to the environment. Existing protections contained in the *Environmental Protection Act* offer some employees security when they report environmental harm in the workplace. This is often known as "whistleblowing". The *Environmental Protection Act* currently prevents dismissal of the employee and offers a procedure before the Ontario Labour Relations Board to assess complaints about treatment of the employee after he/she has reported environmental harm in their workplace.

The Task Force considered the "whistleblower" protection in the *Environmental Protection Act* and recommends that its availability be expanded through incorporation in the Environmental Bill of Rights. This expanded protection for "whistleblowers" is set out in detail in Chapter 3(D).

Political accountability is at the foundation of the proposed Environmental Bill of Rights and the Task Force therefore recommends that the government create an Office of the Environmental Commissioner. The Environmental Commissioner would have responsibility for oversight of this implementation and effectiveness of the Environmental Bill of Rights. A Report from the Environmental Commissioner should be made to the Legislature once every two years commenting on the implementation of the Environmental Bill of Rights, the public participation methods, the Environmental Registry System, the Applications for Review and Investigation, the whistleblower protection and use of the new methods of access to the courts to protect public resources.

In conclusion the Task Force on the Ontario Environmental Bill of Rights recommends that the Environmental Bill of Rights for Ontario recognize government's primary responsibility for protection of our environment but also provide the public with the means to hold government accountable for that responsibility. This accountability can be achieved through:

- incorporating the purposes of the Environmental Bill of Rights into government environmental decision-making,
- specific public participation in environmental decision-making,
- increased access to the justice system to protect our environment and public resources, and
- increased protection for employees who report harm in the workplace.

The public wants and needs to be involved in significant decisions about our environment. The Task Force hopes that this report and the draft Environmental Bill of Rights is the beginning of a process that achieves that goal.

Chapter 1

The Terms of Reference of the Task Force on the Ontario Environmental Bill of Rights

The Establishment of the Task Force

On October 1, 1991, the Honourable Ruth Grier, Minister of the Environment announced in the Ontario Legislature the creation of the Task Force on the Ontario Environmental Bill of Rights (see Appendix I). The announcement followed a period of intense discussions within an Advisory Committee on the Ontario Environmental Bill of Rights which had been established in December 1990. Those discussions provided a valuable amount of information about the various positions and needs of the people of Ontario.

The Advisory Committee had been formed to examine the basic principles of the Environmental Bill of Rights and to suggest ways that they could be applied in Ontario. Representation was invited from a wide variety of groups including labour, business, agricultural and industrial organizations, environmental groups, the First Nations, health and legal advisers, the municipalities and expert staff from various provincial ministries.

At the same time, in December 1990, the general public was given an opportunity to provide written submissions on the goals that an Environmental Bill of Rights should accomplish. More than 350 written submissions were received by the Ministry of the Environment and made available to the Advisory Committee, illustrating the interest that Ontario residents have in the potential value of an Environmental Bill of Rights. However, they also raised a number of important questions that would require more detailed consideration. Choices would have to be made in the actual design of the legislation.

The Task Force on the Ontario Environmental Bill of Rights was established to make recommendations on how to resolve those choices and build on what was learned during the Advisory Committee round. Its task was to determine whether a consensus position could be developed about the actual purpose and content of an Environmental Bill of Rights.

The Task Force was made up of representatives from the business community, environmental groups and the government of Ontario as described in the Acknowledgements section (Appendix IV). Each member of the Task Force was expected to bring a particular perspective to the discussions and to build and maintain a larger network of constituents through which the Task Force could consult more broadly.

One of the responsibilities of Michael Cochrane, as co-chair, was to meet directly with other groups who have a special interest in a proposed Environmental Bill of Rights but were not on the Task Force itself. These groups initially included the Ontario Federation of Labour, the Ontario Federation of Agriculture and the Canadian Bar Association (Ontario), but the consultations were expanded to the many others listed in the Acknowledgements section of this report.

The purpose of the Task Force was to allow the groups and persons most interested in the Environmental Bill of Rights to discuss and develop consensus based recommendations regarding the content of the Environmental Bill of Rights. As a starting point, the members of the Task Force and the office of the Honourable Ruth Grier, Minister of the Environment, agreed upon the following Terms of Reference as a framework for the deliberations.

Terms of Reference of the Task Force on the Ontario Environmental Bill of Rights

Part I: Principles and Objectives

An Environmental Bill of Rights will recognize and be based upon the following policy objectives and principles:

1. *the public's right to a healthy environment;*
2. *the enforcement of this right through improved access to the courts and/or tribunals, including an enhanced right to sue polluters;*
3. *increased public participation in environmental decision-making by government;*
4. *increased government responsibility and accountability for the environment;*
5. *greater protection for employees who "blow the whistle" on polluting employers.*

The Task Force will design an Environmental Bill of Rights that delivers the tools that will assist in achieving these principles and objectives. The list of available tools that could be incorporated into a bill of rights will include the following:

Part II: A List Of Available Tools Which Could Be Incorporated Into A Bill Of Rights

1. *There should be a clearly articulated definition of "environment";*
2. *The creation of a duty of government to protect "public resources";*
3. *A citizen's right to request an investigation and report which would be shared with the person who requested the investigation and the person investigated;*
4. *An expanded civil cause of action for environmental harm;*
5. *A right of standing for environmental claims which goes beyond the recommendations of the Attorney General's Advisory Committee on Standing;*
6. *A private right to compel government instruments and regulations related to the environment to be made, enforced or set aside;*
7. *Expanded provisions for judicial review of government action;*
8. *A public right to participation in the issuance of instruments and the making of regulations, including the right to notice, comment and hearing;*
9. *Improved public access to information upon which environmental decisions are based;*
10. *Extension of existing statutory protection for whistle-blowers to other environmental offenses;*
11. *Encouragement of non-litigious methods of dispute resolution;*
12. *Exemption of certain types of environmental harm from any ultimate limitation period proposed in the Ministry of the Attorney General consultation draft of the General Limitations Act.*

A third part of the Terms of Reference set out some guidelines for the process that the Task Force would follow including the work and responsibilities of the Task Force members, the form of its report and other related matters.

The Work of the Task Force

The Task Force approached its work by attempting to find tools from Part II of the above Terms of Reference that could achieve the principles and objectives contained in Part I. Bill 12 and previous versions of Private Members' bills that proposed an Environmental Bill of Rights were considered to be of importance but not determinative of the direction or content of any Environmental Bill of Rights designed by the Task Force.

The Task Force met on 41 occasions between September of 1991 and June of 1992. During that time individual members of the Task Force, while in contact with their wider constituencies, developed the content of the Environmental Bill of Rights and recommendations contained in this report.

It is important to note that the members of the Task Force devoted a considerable amount of their professional time and expertise to the development of the report and bill. Hundreds of hours were invested, not just at the table developing a consensus, but also in doing research, liaising with constituents and other related work.

The content of this report and the Environmental Bill of Rights is an achievement in which the members of this Task Force take a great deal of pride. The fact that their recommendations are unanimous is testimony to the reasonableness of their approach and to the considerable goodwill that characterized the Task Force's deliberations.

Chapter 2

Ontario's Environmental Law: The Need For Reform

The Task Force acknowledges that the Ontario government has made major advances in environmental protection over the past thirty five years. At the same time, the Task Force recognizes that government's initiatives have sometimes fallen short of public expectations and that public confidence in government's ability to protect the environment is not always high. A brief history may indicate the progress government has made in a relatively short time.

Environmental management has existed in Ontario since 1956, when the Ontario Water Resources Commission was created to establish, monitor and maintain sewage treatment and water supply plants across the province and to ensure that such works conformed to government standards. In 1958, the *Ontario Water Resources Act* was enacted. In 1971, the *Environmental Protection Act* was passed. In 1972, the Ministry of the Environment replaced the Commission and assumed a mandate to protect the natural environment from a broad range of potentially harmful activities, including air emissions and waste disposal sites.

Paralleling the growth in public environmental awareness, the government has strengthened the coverage of the *Environmental Protection Act* through a number of amendments and introduced legislation controlling pesticides (the *Pesticides Act*), requiring environmental assessments for proposed public sector projects and designated private sector projects (the *Environmental Assessment Act*) and encouraging the 3Rs program (the *Waste Management Act, 1992*). Government has also created or amended a variety of laws that regulate the management of the province's natural resources, such as the *Endangered Species Act*, the *Crown Timber Act* and the recent reforms to the *Mining Act*.

Early environmental legislation stressed the voluntary abatement of harmful activity, with government and industry and sometimes, the public, working together to improve environmental quality. Times changed and so did public attitudes towards environmental harm. The public demanded a greater role in environmental protection, stronger environmental laws and better enforcement of those laws.

In 1975, with the passage of the *Environmental Assessment Act* (EAA), the role the public could play in environmental protection was recognized and means for public consultation and participation in the assessment process were legislated. Later, in response to a growing public demand for meaningful participation in decisions made under the EAA, the government introduced the *Intervenor Funding Project Act, 1988* (IFPA). This legislation, which provides funding for intervenors in certain tribunal proceedings, encourages public involvement in the assessment process. The IFPA has recently been extended for four more years while government considers further reforms to the Act.

In the 1960s, few recognized that the consequences of harm to the environment could be as pervasive and serious as they are now understood to be in the 1990s. Acts that led to pollution and environmental degradation were considered "conveniences" tolerated, if not accepted, by the public as a necessary by-product of economic advancement. Now, pollution and environmental degradation are recognized as serious social evils. The Law Reform Commission of Canada has recommended that intentional or negligent acts causing serious damage or endangerment to the environment, be recognized as crimes and included in the *Criminal Code* of Canada (see Law Reform Commission of Canada Working Paper 44, "Crimes Against the Environment", 1985).

The Task Force has heard how the Ministry of the Environment has responded to this increased public awareness. A separate Investigations and Enforcement Branch was created in 1985. In the fiscal year 1984/85, there were 54 prosecutions initiated by the Ministry of the Environment. In the fiscal year 1990/91, there were 313 prosecutions initiated. The Ministry advised the Task Force that it expects that there will be close to 400 prosecutions initiated in the fiscal year 1992/1993. Penalties under the *Environmental Protection Act (EPA)*, the *Ontario Water Resources Act(OWRA)* and the *Pesticides Act(PA)* have increased dramatically in the past decade.

The Ministry of the Environment staff advised the Task Force that along with increased enforcement activity, it has actively continued to abate environmental harm. Ministry abatement staff are responsible for assisting industry to develop facilities that can operate within provincial environmental standards, encouraging the use of cleaner practices and technologies in both private and public sectors, and using administrative tools such as control orders, permits, and licences to ensure compliance with environmental laws. Public participation in abatement activity is now actively encouraged.

Many initiatives for reform of existing environmental laws are currently being undertaken by government. The Task Force considered these efforts, and took note of four projects in particular.

The first involves the Ministry of the Environment's streamlining of the approvals process under the EPA and the OWRA. One of the primary goals of that program is to reduce the number of undertakings that require the submission of applications to the Approvals Branch in order to focus ministry resources on those activities which have a real potential for environmental harm. Methods such as permit-by-rule, the use of exemptions, and the delegation of specific approvals to municipalities are currently being examined. The second goal of the programme is to provide more effective information to applicants through the preparation of a manual. Coincident with that project is the preparation of a reviewer's manual, in order to enhance consistency in the review of applications. A final feature of the programme is to provide applicants with an opportunity for pre-application consultation with the ministry, to help them determine at an early stage what they must do in order to submit a completed application.

Second, the Task Force noted the Ministry of the Environment's Environmental Assessment Process Improvement Project. The Environmental Assessment Advisory Committee is examining ways to promote greater effectiveness, efficiency and fairness in the environmental assessment process. In particular, EAAC is looking at ways to formalize public participation requirements before proponents submit their environmental impact assessment to the government and to increase public consultation at other stages of the assessment process.

In addition, the Task Force learned of the reforms currently being undertaken by the Ministry of Natural Resources. The Ministry introduced its "Directions 90s" program two years ago. This program is designed to reform the Ministry's policy, principles, goals and objectives to reflect growing social concerns regarding resource management and environmental protection. Since its introduction, the Ministry has assembled a number of multi-stakeholder groups to assist in the design of new resource sector plans which are consistent with the policy of sustainable development articulated in "Directions 90s". Multi-stakeholder groups have been created to design plans for forestry, fisheries, and wildlife, and the Ministry intends to continue using this approach to design plans for other sectors.

Finally, the Task Force acknowledged the government's initiative to reform the *Planning Act*. The Commission on Planning and Development Reform in Ontario, chaired by John Sewell, will make recommendations to improve the integration of environmental and land-use planning approvals under the Act.

The Task Force has understood that it could not, and should not, attempt to duplicate or undermine the efforts being directed towards these specific reforms. However, despite government's progress over the past four decades to improve environmental protection, and despite current initiatives for reform, there is a sense that government could and should be doing more. The Task Force began its work by examining those areas of environmental law that were in need of reform and which might be addressed in an Environmental Bill of Rights.

The Task Force did not seek to identify each and every discrete area of environmental law which may be viewed as deficient by various members of the public. Instead, its examination of present law was measured against the policy objectives the Minister of the Environment established for recognition and inclusion in the Environmental Bill of Rights. These policy objectives and principles are set out in Part I of the Task Force Terms of Reference.

The Public's Right to a Healthful Environment

While no environmental law in Ontario explicitly states that the public has a right to a healthful environment, public entitlement to a healthful environment is implicit in the laws designed to protect the environment from socially unacceptable pollution and to safeguard the wise management of our natural resources, including plant and wildlife. These laws are designed to promote a healthful environment for all Ontarians.

However, the ability of people to take direct action to protect their entitlement to a healthful environment is limited under current law. Legal barriers often deny individuals access to the courts or tribunals when such persons try to protect the environment for the environment's sake. Public participation in significant environmental decision making, while often encouraged by government policy or practice, is not consistently provided as a right in law. Where the public is uninformed and uninvolved in such decision making, government accountability for such decisions is not high.

> ***An Environmental Bill of Rights should recognize the public's right to a healthful environment by providing the public with the legal and other tools necessary to achieve it.***

Increased Public Participation in Environmental Decision-Making By Government

In examining present environmental laws, it became apparent that the public does not have a consistent, clear right to participate in significant environmental decisions by government. Government makes such decisions in the form of policy, regulations or when it issues licences, permits, approvals or orders controlling activity which may result in environmental harm. The Task Force reviewed existing laws administered by the ministries of Environment, Natural Resources and Northern Development and Mines and found that the public's legal entitlement to notice and an opportunity to comment on significant environmental decisions made by these ministries was far from uniform. For example, there are no legal requirements for public notice or consultation where government proposes to issue air emissions approvals under the *Environmental Protection Act*. The Ministry may consult (and often does) with affected members of the public before it issues such as an approval but it does so as a matter of practice not law. Is this an important distinction? The answer is, yes. A state of the law which does not expressly recognize the public as a partner working with government and industry to promote a better environment is not likely to inspire public confidence or participation. The public requires an accessible and transparent decision-making process in order to measure government's accomplishments and to hold government accountable where it fails to meet public expectations respecting environmental protection.

Consider the fact that currently where the law does not require public participation, a company located near a residential community can apply for and be granted a certificate to release an approved level of a known contaminant into the air without any member of that community being notified of the application or being provided an opportunity to comment on the approval: see section 9 of the EPA.

Where the law does not require public participation, government can proceed to regulate emission levels for certain substances with no obligation to give notice to the public of its intent to regulate or to consult with the public as to what the appropriate emission standard should be. Apart from compliance with requests made under the *Freedom of Information and Protection of Privacy Act*, government is not required to disclose any background papers, scientific studies, option papers or other materials it used to determine the need for regulation or the basis for determining the standard imposed in the regulation. The Task Force noted that government frequently, as a matter of policy or practice, consults the public when it develops regulations. This is happening now, in the Ministry of the Environment, as the Municipal-Industrial Strategy for Abatement (MISA) regulations are being developed. Committees such as the Advisory Committee on Environmental Standards (ACES) have a mandate which includes broad public consultation as a requirement in the development of proposed standards. But the public cannot be assured that a government policy or practice inviting its participation in significant environmental decisions will continue without change. Indeed, the Task Force found that government policies requiring public participation were varied and discretionary.

The Task Force found that public participation in environmental decision-making lacked two fundamental features: certainty and predictability. The public should have a right to a prescribed level of participation and this level of participation may vary depending on the kind of decision to be made (policy, regulation or instrument issuance). Similarly, public rights to participation may vary depending on the level of environmental significance of the decision to be made.

Where the public's right to participate in significant decisions is acknowledged and provided for, the result should be more environmentally sound decisions by government. More information should inevitably lead to better decisions.

> ***An Environmental Bill of Rights should recognize the right of the public to participate in significant environmental decision making by government. It should prescribe in law a uniform system that is transparent and that provides an opportunity for better decisions and greater government accountability.***

Improved Public Access to Justice

The public may seek access to the courts for one of three purposes: to seek the enforcement of existing environmental laws; to seek compensation for harm done to the environment; and to seek judicial review of decisions made by government, its agencies or tribunals, which are regarded as environmentally unsound.

(i) Enforcement of Existing Laws in Criminal Courts

At present, an individual has few effective legal tools to compel government to enforce existing laws. There are also a number of limitations on a person's ability to act independently of government to enforce existing laws.

Currently, any member of the public may complain to government about apparent contraventions of environmental laws. For example, the Ministry of the Environment and its Spills Action Centre report that they receive and investigate approximately 25,000 such complaints a year. In many cases, the Ministry takes administrative action to enforce compliance with the law or abate the problem; some 400 complaints will result in prosecutions in 1992. However, a person in Ontario making such a complaint has no legal entitlement to require the government to investigate an alleged offence or to require that the government respond in writing indicating the action, if any, it proposes to take respecting a complaint. Informal complaints to ministries, letters to Ministers and media exposure may not always be sufficient to compel enforcement.

Under the current law, where an environmental offence is alleged to have been committed, a person with reasonable and probable grounds may commence a private prosecution. However, that person must use his or her own resources to compile and present evidence in a court of law and the Attorney General may, as of right, intervene at any stage of the proceeding to stay or withdraw the charges or assume carriage of the prosecution. The limits on an individual's ability to maintain a private prosecution are based on public policy considerations. However, these limits emphasize the importance of providing a person with the necessary tools to require government to investigate and account for its decision to take action to abate the alleged harm to the environment and/or to prosecute.

A model of a formal procedure for an Application for Investigation which could meet these objectives is contained in the *Canadian Environmental Protection Act*.

> ***An Environmental Bill of Rights should provide the public with the legal right to request that government investigate alleged environmental offences and that government respond to these requests.***

(ii) Compensation for Environmental Harm Through The Civil Courts

At present, the ability to commence and maintain a civil cause of action is restricted to those persons seeking compensation for direct harm to their person, property or economic interests. Widespread public harm is generally actionable only at the instance of the Attorney General, who, in law, is considered to be the sole guardian of the "public interest". For a number of

> reasons, members of the public are increasingly challenging the notion that there is a single "public interest" which can be effectively advanced by the Attorney General alone.
>
> Despite this growing challenge, the courts rarely recognize a person who has not suffered a direct loss as being the proper person to stand before the court and complain of a public loss resulting from environmental harm. A person may stand in the Attorney General's shoes and sue for widespread public harm only where the Attorney General consents to the action or where the person can prove that he or she has suffered a loss which is different in kind or degree from that of other members of the public. This is often referred to as the "public nuisance rule".

The public nuisance rule limits public access to the courts. It has been applied by the court to prevent commercial fishermen from suing a company responsible for polluting public waters to the extent that fish were killed and the fishermen lost their livelihood. (The Task Force considered, in this regard, the case of Hickey v. Electric Reduction Co. (1970), 2 Nfld. & P.E.I.R. 246, 21 D.L.R. (3d) 368 (Nfld.S.C.).).

The fishermen could not get a remedy from the court for two reasons. Firstly, no individual fisherman could establish that he suffered a harm that was different not only in degree, but in kind from that suffered by the other fishermen. The livelihood of each was lost as a result of the pollution and the death of fish. Secondly, the law does not recognize any legal interest in fish that might be caught in the future. The fishermen did not have standing in law to complain of their loss or an actionable interest for which the court could give a remedy.

An Environmental Bill of Rights should address the need to reform the public nuisance rule.

What happens when a person wants to sue, solely on a principled basis, someone who has harmed public resources on the basis that this harm is wrong and not because of any direct harm to that person's personal, proprietary or economic interests?

Today, people cannot readily commence or maintain a lawsuit in the public interest against someone who pollutes or degrades a public resource. This is the case even where the harm to a public resource occurs as a result of someone not complying with the law. Quite apart from the standing problem discussed above, this is because the traditional actions which courts hear, such as nuisance, negligence, riparian rights or breach of contract, all depend upon a loss to someone's personal, proprietary or financial interests. When the government fails to bring a lawsuit for environmental harm to public resources on behalf of the public, there is no specific civil cause of action which people can use to go to court and get a remedy for this public loss.

> ***An Environmental Bill of Rights should increase the public's access to the court where public resources are harmed or could imminently be harmed by someone who is not acting within environmental laws and the government has not taken action.***

Increased Government Accountability for its Environmental Decisions

Providing the public with a uniform, legislated right to notice of a significant environmental decision, and an opportunity to comment on the proposed decision is currently absent from the law. However, notice and comment alone do not make government accountable for the decisions it ultimately makes. The public needs to know the reasons why government makes a particular significant environmental decision. Where government is compelled to provide reasons for the significant environmental decisions it makes, the public can judge whether government has fulfilled its mandate to protect the environment and wisely manage the province's resources.

The Task Force found that written reasons for significant environmental decisions made by government are not uniformly required under present law and where required, are not always readily accessible to the public.

In addition, today's environmental laws do not recognize the right of an interested member of the public to appeal significant environmental decisions in any circumstance. Existing rights of appeal may belong to the applicant for a licence, permit, or approval who has either been denied the instrument applied for or who takes issue with the terms and conditions government places on the licence, permit or approval it issues. A party whom government orders to do something may have a right of appeal. A member of the public who has a demonstrable interest in the issuance of that order, even where the order is unreasonable having regard to the laws governing its issuance, has no similar right of appeal.

> ***An Environmental Bill of Rights should recognize the public right to reasons for significant environmental decisions by government and provide for a right of appeal, in appropriate circumstances, to interested members of the public who are not parties to the decision. These reforms would promote government accountability for such decisions.***

The Task Force noted that present environmental laws such as the *Environmental Protection Act* or the *Ontario Water Resources Act* do not require the government to review periodically the adequacy of existing policies, regulations or instruments to ensure that they are protecting the environment. Public requests to government to review such policies or laws can be made by way of a letter but there is no legal requirement that government address such requests. The same observations apply where the public requests government to review the need for a policy, regulation or instrument where none presently exists.

For example, where government has regulated emission levels for certain substances and new, cogent scientific evidence has emerged indicating that these levels should be lowered to effectively protect the environment, the public can bring the need for a review of these standards to government's attention. However, government is not required at law to consider such requests or to provide written reasons in response to the request. The public has no legal right to make government account for a failure to consider such a request.

> ***An Environmental Bill of Rights should give the public the right to request government to review the adequacy of existing policies, regulations or instruments or the need for a new policy, regulation or instrument. Government should have a legal duty to consider the request and respond with written reasons.***

At present, there is no legal mechanism in place to oversee government's administration of environmental laws and to provide an independent assessment of government's success or failure in achieving the goal of a sustainable, healthful environment for Ontarians.

> ***An Environmental Bill of Rights should promote greater accountability of government for its decisions and the protection of the environment.***

Reporting Environmental Harm in the Workplace

Section 174 of the *Environmental Protection Act* provides for protection from reprisal by employers against employees who report environmental violations under several Acts administered by the Ministry of the Environment. While this is a valuable protection, it could be made applicable to a broader range of environmental statutes administered by other Ministries.

> ***An Environmental Bill of Rights should extend "whistleblower" protection to protect more employees in Ontario.***

In conclusion, the Task Force recognizes the very significant advances made in environmental protection over the last four decades in Ontario. However the government has an opportunity to take steps to provide residents of Ontario with the power to participate in the significant decisions being made that will affect the enjoyment of the environment by present and future generations. There is also an opportunity at hand for the government to provide residents with the legal means to protect the environment and in particular public resources through increased access to the justice system. There is an opportunity at hand for the government to offer workers security in their workplace when they report incidents of alleged environmental harm. Last and most important, the government has an opportunity to make itself accountable for the most significant environmental decisions it makes. The Task Force believes that all of these opportunities can be met through an Environmental Bill of Rights.

Chapter 3

The Proposed Ontario Environmental Bill of Rights

A. INTRODUCTION: PREAMBLE, PURPOSES AND ENVIRONMENTAL VALUES

In this chapter we will examine the essential components of the Ontario Environmental Bill of Rights as designed by the Task Force. In order to understand the Task Force's approach to the Environmental Bill of Rights it is important to appreciate the design assumptions that influenced its work and to understand the essential philosophical questions that needed to be resolved.

The Terms of Reference for the Task Force are set out in full in Chapter 1 but it is important to recall at this point the principles and objectives that the Honourable Ruth Grier, Minister of the Environment, mandated for inclusion in the Environmental Bill of Rights. These principles and objectives included:

(i) the public's right to a healthy environment;
(ii) the enforcement of this right through improved access to the courts and/or tribunals, including an enhanced right to sue polluters;
(iii) increased public participation in environmental decision-making by government;
(iv) increased government responsibility and accountability for the environment; and
(v) greater protection for employees who "blow the whistle" on polluting employers.

It was also provided in the Terms of Reference that the Environmental Bill of Rights should be fair and balanced, realistic, and should minimize potential dislocation in our courts. Task Force members agreed that the Environmental Bill of Rights should be capable of being implemented in a cost effective way and should change existing laws only to the extent necessary to achieve the Task Force's consensus.

Task Force members were well aware of earlier Private Members' proposals for Environmental Bills of Rights and understood that they were free to develop an Environmental Bill of Rights that differed from previous attempts.

With all of the above considerations in mind, the Task Force began its deliberations and very shortly confronted a basic philosophical question about the purpose and meaning of an Environmental Bill of Rights. Over the last decade, Canadians have felt the benefits and effects of the *Charter of Rights and Freedoms*. The concept of an Environmental Bill of Rights has been compared by some to the Charter. The *Charter of Rights and Freedoms* gives citizens rights to challenge legislative initiatives in our courts. The ultimate effect of the *Charter* has been to limit the ability of governments and government officials to act in certain ways. In other words, Canadian legislatures are prohibited from enacting laws that affect citizens in ways that are considered by the courts to be contrary to the *Charter of Rights and Freedoms*. This approach to protecting individual liberties and rights has its analogy in protection of the environment. Legislatures, it was said, should be prohibited or proscribed from enacting or applying laws that directly or indirectly result in harm to our environment. This approach would necessarily involve giving individual residents the right to engage the court system to strike down laws that harm the environment. In this approach governments would be "sent back to the drawing board" to develop a law or practice that does not harm the environment.

An alternative approach is one that does not use the courts to control government conduct but rather empowers individual residents of the province to play a role in protecting the environment. This approach invites residents to engage the government decision-making process and the political process, rather than the judicial process. Residents of the Province would have an opportunity to become involved in the process that generates decisions that affect our environment. With this approach, access to the courts is used as a last resort and, at that stage, in addition to the political accountability that should accompany any democratic process.

The Task Force resolved this philosophical question of the appropriate role of government as opposed to the courts by electing to design the Environmental Bill of Rights around an approach that empowered individual citizens to affect the democratic process that produces environmental decisions. It was felt that a Charter style environmental right would create too much uncertainty while the courts considered government's decisions with respect to the environment. This uncertainty would be felt by the public, business, government and, most of all, the environment itself. The Task Force's approach entails not just the right to participate in decision-making, but also certain responsibilities. It is an approach that is rooted in political accountability for decisions that are made. This theme of political accountability will surface throughout the report and the recommendations.

The Preamble to the Environmental Bill of Rights

The Task Force is of the opinion that the Ontario Environmental Bill of Rights is potentially such a significant piece of legislation that it warrants the inclusion of a preamble that captures the philosophical approach and object of the reforms.

It is not every enactment by a Legislature that requires a preamble. A preamble offers the Legislature a unique opportunity to describe the object of the reforms that are contained in the legislation. While regarded as a part of an Act, the preamble is not actually a part of the text of the law. One very old case stated that the preamble should afford "useful light" as to what a statute intends to reach. As one well-known Canadian author (E.A. Driedger, Construction of Statutes, 2nd ed. p.146) remarked, "A preamble may set out the object of the Act or the circumstances giving rise to the Act, and these factors must be taken into account in reading the Act".

If any confusion remains about the purpose and function of the preamble to an Act, Section 8 of Ontario's *Interpretation Act* provides as follows:

> The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and the object of the Act.

The Task Force considers one important philosophical underpinning of the Ontario Environmental Bill of Rights to be a recognition that, although government and the public share responsibility for the environment, government's responsibility is the primary one.

Governments, whether federal, provincial or municipal, have for many years been making the key decisions that affect our environment. These decisions include everything from the regulation of industries, to the setting of standards, to the way that decisions about taxation are made. The Task Force's opinion that government has the primary responsibility to protect the environment is not so much a statement of what should be, as a recognition of the current state of affairs. The difficulty the Task

Force identified was resolving the predicament created when government does not meet its share of the responsibility satisfactorily. It is this issue that the Task Force attempts to address through the major elements of the Ontario Environmental Bill of Rights. The protection of the environment is something that cannot be left just to the public or just to government. Both must work together to protect the environment in a timely, effective, open and fair way.

The Task Force therefore recommends that:

- ***the preamble to the Environmental Bill of Rights acknowledge that the public and government must strive individually and collectively to achieve the common goal of protecting our natural environment but that government has the primary role.***

The Meaning of Environment

Early on the in the Task Force's deliberations, members turned their attention to the need for a clearly articulated definition of "environment" in the Environmental Bill of Rights. If an object of the Environmental Bill of Rights is an acknowledgement of the government's responsibility for protection of the environment, then what must the government protect?

Proposed definitions of the environment ranged from ones that included cultural and social aspects of our lives to those that focused on essentially the natural environment. The Task Force considered the definitions of "environment" used in other pieces of significant environmental legislation including the following:

- *Canadian Environmental Protection Act*:

  "environment" means the components of the Earth and includes
  (a) air, land and water,
  (b) all layers of the atmosphere,
  (c) all organic and inorganic matter and living organisms, and
  (d) the interacting natural systems that include components referred to in paragraphs (a) to (c);

- Northwest Territories *Environmental Rights Act*:

  "environment" means the components of the Earth within the Territories and includes
  (a) all air, land, water, snow and ice,
  (b) all layers of the atmosphere,
  (c) all organic and inorganic matter and living organisms, and
  (d) the interacting natural systems that include components referred to in paragraphs (a) to (c);

- Michigan *Environmental Protection Act*:

  "air, water and other natural resources ..."

- Ontario's *Environmental Assessment Act*:

  "environment" means,
  (i) air, land or water,
  (ii) plant and animal life, including man,
  (iii) the social, economic and cultural conditions that influence the life of man or a community,
  (iv) any building, structure, machine or other device or thing made by man,
  (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
  (vi) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario;

- Ontario's *Environmental Protection Act*:

  "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario.

Added to these considerations was the question of whether the Task Force should attempt to design an Environmental Bill of Rights that would apply to "indoor" aspects of our environment such as "indoor air", as well as the "outdoor", natural environment.

The Task Force reflected on the various definitions used in other jurisdictions and also on members' assessment that the residents of Ontario see the primary role of an Environmental Bill of Rights as that of protecting the natural environment. It recommends that the Ontario Environmental Bill of Rights apply to the natural environment. Natural environment should be defined to include air, land, water, plant life, animal life and ecological systems of Ontario.

The Task Force recommends that:

- ***for the proposed Environmental Bill of Rights, environment be defined to mean the air, water, land, and plant life, animal life and ecological systems of Ontario,***
- ***"air" be defined to mean open air, not enclosed in a building, structure, machine, chimney, stack or flue,***
- ***"land" be defined as including wetland and land covered by water but not land enclosed in a building, and that***
- ***"water" be defined to include ground water.***

The Purpose of the Ontario Environmental Bill of Rights

While the preamble to an Act is designed to provide a description of the object of the Act and is used as a guide in interpreting it, the purposes clause to an Act is an essential legal component that influences expressly the interpretation of portions of the legislation.

So, while the preamble to an Environmental Bill of Rights recognizes the shared responsibilities of the public and government and acknowledges that primary responsibility to protect the environment rests with government, the purposes clause of an Environmental Bill of Rights should set out the goals of this particular legislative reform.

Assuming that government has the primary responsibility for protection of the environment, the purpose of the Environmental Bill of Rights would be to protect, conserve and, where reasonable, restore the integrity of the natural environment to provide sustainability of the environment for the benefit of present and future generations and to protect the right of present and future generations to a healthful environment as provided in the proposed Bill.

There are several key words in this purpose - "protect", "conserve", "restore" - that convey goals that are more comprehensive than merely stopping environmental harm. An Environmental Bill of Rights, if it is to have any meaning, must not only protect the environment as it exists, but it must seek to maintain key aspects of it and in some cases where harm has occurred, restore the natural environment.

Another essential aspect of the purposes clause for an Environmental Bill of Rights is recognition that these goals of protecting, conserving and restoring the natural environment apply to more than just those who are using the environment today but also apply to future generations. It is this aspect of the purposes clause that captures the need to balance rights and responsibilities in an Environmental Bill of Rights.

The Task Force considered the above goals to include:

- the prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment;
- the protection and conservation of biological, ecological and genetic diversity;
- the protection and conservation of natural resources, including plant life, wildlife, and ecological systems;
- the identification, protection and conservation of ecologically sensitive areas or processes; and
- the encouragement of the wise management of our natural resources.

The purposes clause of the Environmental Bill of Rights should therefore, above all, recognize the need to protect, conserve and, where reasonable, restore the integrity of the natural environment for the benefit of present and future generations.

The Task Force recommends that the purposes of the Environmental Bill of Rights be:

- ***to protect, conserve and, where reasonable, restore the integrity of the environment;***
- ***to provide sustainability of the environment for the benefit of present and future generations;***
- ***to protect the right of present and future generations to a healthful environment;***
- ***the prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment;***
- ***the protection and conservation of biological, ecological and genetic diversity;***
- ***the protection and conservation of natural resources, including plant life, animal life and ecological systems;***
- ***the encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems; and***
- ***the identification, protection and conservation of ecologically sensitive areas or processes.***

Achieving the Purposes of the Environmental Bill of Rights

With the principles and objectives of Part I of the Terms of Reference in mind, the Task Force approached the design of the Environmental Bill of Rights with the goal of achieving the above purposes through four primary methods:

(a) facilitating public participation in significant environmental decision-making,
(b) increasing accountability of the government for its environmental decision-making,
(c) increasing access to the courts for the protection of the environment, and
(d) increasing the protection for workers who wish to report environmental harm in the workplace.

Statement of a Ministry's Environmental Values

The Task Force wanted to develop the best method of ensuring that the purposes of the Environmental Bill of Rights were carried through and influenced government decision-making with respect to the environment. The Ontario Environmental Bill of Rights would apply to a number of different ministries that have very different interests in the natural environment. The purposes of the Environmental Bill of Rights, for example, may have a very different meaning to the Ministry of Natural Resources than to the Ministry of Agriculture and Food. The Task Force considered how a specialized application of the Environmental Bill of Rights' purposes could be achieved ministry by ministry.

Many ministries within the Ontario Government have developed the equivalent of "mission statements" or "strategic plans" that set goals and methods of achieving those goals for a Ministry over a period of time. The Task Force is of the opinion that a similar statement is needed for each ministry with respect to its "environmental values".

The Task Force recommends that each ministry that makes environmental decisions that have or may have an impact on the environment, develop a draft "Statement of Environmental Values". This Statement need not be lengthy and should achieve two objectives: first, it should provide a concise statement of what the purposes of the Environmental Bill of Rights means to environmental decision-making within that Ministry and second, it should integrate the purposes of the Environmental Bill of Rights into the considerations that are already being applied as a part of that Ministry's decision-making.

The Task Force acknowledges that Ministries already apply a variety of considerations in reaching their decisions. These include social, economic and, in many cases, scientific considerations. The Task Force does not wish to see those considerations abandoned but, instead would like to see the purposes of the Environmental Bill of Rights integrated into them. This would not guarantee the application of the purposes of the Environmental Bill of Rights in environmental decision-making, but it would guarantee their consideration and, therefore, would substantially increase the likelihood of their application.

The process of various ministries developing draft Statements of Environmental Values should begin immediately and need not await actual passage of the Environmental Bill of Rights. The Task Force considers the development of these Statements to be a priority.

Effect of the Statement of Ministry Environmental Values

Individual ministries make thousands of decisions each year that affect the environment. These decisions are reflected in policies, in regulations and in individual instruments. The Ministry's Statement of Environmental Values, designed in consultation with affected groups, should influence, from the top down, attitudes and, therefore, these environmental decisions.

Since the goal of a Statement of Environmental Values would not be to guarantee that the purposes of the Environmental Bill of Rights will be embodied in every decision made by a Ministry but to ensure that the Statement is considered by decision-makers, decisions would no doubt be made that do not reflect the purposes of the Environmental Bill of Rights. It is at that point the Task Force feels political accountability must occur.

Over time the public, through participation in environmental decision-making, will become aware of those decisions made by government that apply the purposes of the Environmental Bill of Rights, and those decisions that do not. It is on that record that governments will be judged for their ability to meet their primary responsibility of protecting the environment.

The Task Force recommends that:

- ***the purposes of the Environmental Bill of Rights be achieved through four primary methods:***
  - ***(a) providing the means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;***
  - ***(b) providing increased accountability of the Government of Ontario for its environmental decision-making;***
  - ***(c) increasing access to the courts by residents on Ontario for the protection of the environment; and***
  - ***(d) enhancing the protection for employees who take action in respect of environmental harm.***
- ***each Ministry in the government of Ontario that makes decisions that affect or may affect the environment, develop a Statement of Environmental Values,***
- ***the Statement of Environmental Values be developed in consultation with the public,***
- ***the Statement of Environmental Values be a concise statement of the integration of the purposes of the Environmental Bill of Rights with the social, economic, scientific and other considerations already being applied by that ministry in environmental decision-making,***
- ***the Statement of Environmental Values be used by the Ministries to guide future environmental decision-making,***
- ***the Statements of Environmental Values be developed as soon as possible.***

With the above preamble, purposes, definition of "environment" and approach in mind, we now turn to the consideration of the means by which the public can be involved in significant environmental decisions by government.

B. PUBLIC PARTICIPATION IN SIGNIFICANT ENVIRONMENTAL DECISION-MAKING BY GOVERNMENT

(i) The Environmental Registry System

The government of Ontario, comprising dozens of Ministries and tens of thousands of public servants, makes thousands of decisions that affect the environment every year. Some of these decisions are relatively minor in nature - a fishing or hunting licence is issued or a small variation in a restaurant vent fan is approved. Other decisions are extremely significant as in the case of issuing licences for timber cutting on Crown lands or the development of new standards for water quality. Day in and day out, over the years government therefore makes decisions that have a profound effect on our environment as we enjoy it today and on the likelihood that future generations of Ontarians will enjoy the same benefits.

Environmental decisions by government fall into three general categories - policy decisions, regulations and instruments. Policies include any major program, plan, objective or guideline of the government. These may not always be in the form of an Act passed by the Legislature although sometimes they are brought into effect by way of an Act. The Ministry of the Environment has announced, for example, policies to deal with the province's water management goals and for the making of guidelines for decommissioning and clean-up of sites in Ontario. These are significant policy decisions made in the context of broad environmental goals.

Regulations are a form of law, rule, order or by-law of a legislative nature which is made or approved under an Act. They are often used to ensure that the desired environmental decision has the effect of law. Again, like policies, they can have a significant impact on the environment. Regulations have been passed pursuant to the *Environmental Protection Act* to do such things as control contaminants in the air.

Finally, the category of decisions of which there are the greatest number - instruments. This category includes licences, permits, approvals, certificates of approval, control orders and other legal authorizations. As mentioned earlier this category includes the giving of government "permission" for everything from fishing licences to chimney approvals for large factories.

As Chapter 2 *The Need for Reform* points out, there is no uniform, predictable or certain method for the making of these environmental decisions. This is a problem that confronts not just those who are asking government to make the decision, but those who will be affected by the decision once it is made. A company that requires certificates of approval, licences and permits to operate a new facility needs a predictable environmental decision-making system as much as the residents of the local community who might be affected by emissions from the plant. Public comment through a predictable, uniform system should produce "better" decisions.

Another aspect of this problem concerns the great variance in the "significance" of the decision itself. Simply put, not every decision that might affect the environment requires public involvement or public comment. One authority (Pareto) has noted that a small percentage of the decisions that must be made will usually cause a majority of the problems. This is as true for major corporate decisions as it is for environmental decisions with respect to policies, regulations or instruments.

With respect to environmental decisions their relative "significance" may be derived from a number of factors, such as:

- the potential impact on the environment,
- the geographic extent of the impact (ie, local, regional or provincial),
- public interest in the decisions, and
- the importance to the government and persons dependent upon the decision once it is made.

With the above in mind, that is, the categories of decisions which government must make, their importance to the environment, the number of decisions, the lack of uniformity and predictability in the process for making the decisions and their relative "significance", the Task Force set out to develop a system for public participation in environmental decision-making that would:

- provide a comprehensive framework that guides the government in establishing public participation procedures for environmental decision making;
- provide opportunities for public participation in environmental decision making that are meaningful and can contribute to good decision making;

- establish a higher degree of certainty and uniformity in the way in which public participation takes place; and
- ensure that the resources allocated to public participation are targeted to those areas for which such participation is most needed - the significant environmental decisions.

The Environmental Registry

Meaningful opportunities for the public to participate in environmental decision-making can only occur if the public has notice of the government's intention to make a policy decision, to issue a regulation or to make or grant an instrument that is significant. Once notice has been given, those interested in the proposed decision must have a timely opportunity to comment in the context of a process that is uniform and certain.

The Task Force believes this need and the goals set out above can be met through the establishment of an Environmental Registry System (ERS) which would provide a uniform, predictable and certain system for providing notice of pending significant environmental decisions, an opportunity to comment, notice of the decision once made and, in some cases, appeal rights.

The following portions of this section describe the Environmental Registry System in greater detail.

The Task Force's vision of a notice and comment regime for the proposed Environmental Bill of Rights revolves around the notion of an electronic registry. Such a registry would serve as a databank and bulletin board for all proposed significant environmental decisions being considered by the province. Whenever the government is about to make such decisions, it would provide notification by posting a notice on the electronic registry that includes a brief description of the decision to be made. The public would be able to gain access to the registry through a number of means: for example, by computer modem or through local government offices.

Following the issuance of a notice, there would be a prescribed comment period, permitting the public an opportunity to offer their views. Once the responsible Ministry exercises its discretion and makes a decision, notice would then be given of the decision. Reasons for the decision would be available to the public.

The Environmental Registry System should be comprised of three main components: a policy component, a regulation component and an instrument component. Each component would provide a "track" on which significant proposed environmental decisions would move. As the proposed decisions entered the Environmental Registry System they would follow rules that provided minimum levels of notice and timely opportunities to comment. Once a decision was made, notice of it would be given on the Environmental Registry System.

This type of system should only apply to proposed decisions, that is, significant environmental decisions that government proposes to make after the Environmental Bill of Rights comes into force. The Task Force foresaw huge resource demands and little benefit from an Environmental Registry System that recorded past decisions with respect to the environment. The primary goal is to provide notice of future decisions.

This type of approach requires a high degree of specificity in identifying the proposed significant environmental decisions. If the system is to be predictable and efficient, then users of it would need to know in advance which decisions must go through the Environmental Registry System and which need not.

This high degree of specificity can be achieved in a number of ways:

- with respect to policies, a definition of the types of proposals and Ministerial discretion that will be required,
- with respect to regulations, a definition of the types of regulations and a setting out of applicable legislative Acts/regulations that should be included, and
- with respect to instruments, a definition of the types of proposed instruments and a specific listing by regulation of the significant instruments themselves should be included.

In regard to the last category, significant environmental instruments, it is proposed that instruments be classified to provide for a uniform and predictable system. Classification should provide for gradients of notice and of public participation opportunities depending upon the significance of the potential impact, the geographic extent of the impact and the degree of public and provincial interest in the proposed decision. This will enable the public to have the greatest degree of input on the most significant proposed environmental decisions.

The Task Force developed the following general definitions of the three categories of decisions that could flow through the Environmental Registry System:

Policies

Policy means any major program, plan, objective or guideline of the government. It is proposed that the Environmental Bill of Rights apply to only those policies that have a significant environmental impact or potential for such impact and that are identified by the Minister responsible for that policy as warranting public consultation.

Specifically excluded would be those policies that:

- are purely administrative in nature;
- are financial, including, for example, grants and loans;
- arise from emergencies and cannot await public comment.

Amendments to existing policies would be subject to the Environmental Bill of Rights if they would materially change the potential for significant effect on the environment from the existing policy. In these instances, only the amendment would be subject to review, not the entire policy. The Minister, however, could decide otherwise.

For the purposes of the Environmental Registry System, policies would be defined to include environmental guidelines, objectives or criteria that are used to control the contamination or degradation of the environment. "Standards" are considered to be those limits to the emission of contaminants to the environment or the degree of permissible degradation that are established through regulation. Standards are, therefore, addressed through the procedures established for regulations.

Regulations

The Environmental Registry System should apply to all regulations and amendments to regulations made under a prescribed Act, that would have significant environmental impact or the potential for significant environmental impact. Specifically excluded would be those regulations that are:

- purely administrative in nature;
- financial;
- required to address emergencies and cannot await public comment.

Instruments

For the purposes of the Environmental Registry System, "instrument" would mean any licence, permit, approval, certificate of approval, control order or other legal authorization that controls contamination or degradation and is made under a prescribed Act. It is intended that the Environmental Registry System would only apply to those for significant instruments that are specifically identified in regulations under the Environmental Bill of Rights. Each instrument would be classified to identify a specific required level of public participation. These Classes are set out in a later section of this report.

Applications for amendments to existing instruments would be subject to the provisions of the Environmental Bill of Rights to the extent that they may result in a material change in the instrument's effect on the environment.

Exceptions

Existing Legislative Provisions for Public Participation

It is recommended that the Environmental Registry System not apply to decisions made under existing legislation where such legislation contains public participation provisions which are substantially in compliance with the Environmental Bill of Rights. This is consistent with the Task Force's view that the Environmental Bill of Rights should not result in a duplication or layering of existing legislative requirements respecting public participation at each step of an approval process.

It is proposed that the public consultation provisions of existing legislation be considered to be in accordance with the Environmental Bill of Rights standard where the Minister responsible for administering the existing legislation determines that it provides public participation regimes that are substantially in compliance with the level of public consultation mandated for the policy, regulation or the appropriate Class of instrument by the Environmental Bill of Rights.

Two other specific exemptions from the application of the Environmental Bill of Rights public participation regime need to be addressed. It is recommended that the Environmental Registry System provisions not apply where instruments are issued:

- to implement a decision which has been made through a consultative process before an independent tribunal;
- pursuant to decisions made under the *Environmental Assessment Act*.

The Task Force was of the view that applicants for environmentally significant instruments should not be placed in a position of "double jeopardy". Further public consultation on the issuance of each instrument required to implement a project already approved through a consultative process before an independent tribunal would make decision-making unnecessarily complex, costly and promote delay. Such an approach could result in inconsistent decisions. Environmental protection values consistent with the purpose of the Environmental Bill of Rights should be injected into the initial stage of decision-making and then carried forward into the issuance of specific instruments. The previous recommendations respecting the application of the ministry-specific Statements of Environmental Values to decision-making by government and the role of the Environmental Commissioner (see Chapter 3(B)(ii)) should assist in achieving this goal.

It is also expected that, over time, existing environmental legislation would be brought into compliance with the provisions of the Environmental Bill of Rights respecting the issuance of regulations and instruments (see Chapter 3(B)(iv) - Application for Review).

The integration of the Environmental Bill of Rights public participation regime with the consultative process contained in the *Environmental Assessment Act* presented a specific problem. The *Environmental Assessment Act* now provides the opportunity for public participation before the undertakings to which it applies are approved. The adequacy of public involvement in decisions made under the Act is one aspect of the environmental assessment process which is currently undergoing a thorough analysis with a view to reform. The Environmental Assessment Advisory Committee (EAAC) is expected to report to the Minister of the Environment very soon, providing its detailed proposals for reform. The Task Force believes that its recommendations for the Environmental Bill of Rights should not, and could not, supplant or duplicate the years of work EAAC has devoted to these matters.

Given the opportunity for extensive public participation already present in the *Environmental Assessment Act*, later decisions which are required to implement approved undertakings under the Act (e.g., approvals issued under the Municipal Engineers Class EA or the permits to be issued under the Timber Management Class EA once determined at the conclusion of the present hearing) are considered to be substantially compliant with the minimum requirements of the Environmental Bill of Rights. Therefore, the issuance of instruments which implement or are pursuant to EAA decisions will not be subject to the public participation requirements of the Environmental Bill of Rights.

Exemptions under the *Environmental Assessment Act*, which are currently made by order or regulation, generally without advance notice to the public or an opportunity for public consultation, would be subject to the public participation requirements of the Environmental Bill of Rights.

Emergencies

For the purposes of the Environmental Bill of Rights, emergencies are considered to exist where there is a risk of:

(a) danger to the health or safety of any person;

(b) impairment or immediate risk of harm to the quality of the natural environment for any use that can be made of it; or

(c) injury or damage or immediate risk of injury or damage to any property.

It is recommended that decisions required to resolve emergency situations be registered but that they would not be affected in any other way by the Environmental Registry System. The responses to emergencies are normally irreversible and cannot be time limited or reversed by a later decision. In fact, the issuance of an emergency instrument is generally intended to bring the situation under control and remove the immediate threat. These instruments typically do not lessen the need for a long term strategy to address issues that remain at the site of the emergency. In fact, they often put in place actions required (e.g., fact gathering studies) to develop the necessary long term strategies that would result in the issuance of instruments. However, any long term strategy so developed would be subject to the public participation requirements of the Environmental Bill of Rights through the instruments required to implement it.

As an example, emergency actions were necessary to control the Hagersville tire fire and to limit the environmental consequences of the fire and the efforts to control it. The actions taken were, for all intents and purposes, irreversible. Time limits on the instruments would have no meaning in that context for they only provided for the required actions to address the emergency. Once the emergency is abated, long term planning within the public participation context of the Environmental Bill of Rights is possible and required as the instruments are put in place to fully remediate the site.

It is important to note that as proposed policies, regulations and instruments come forward with notice to the public and an opportunity to comment, they should have been prepared within government after consideration of the relevant Ministry's Statement of Environmental Values. The proposed decisions should therefore already have been formulated with the purposes of the Environmental Bill of Rights as integrated into the Statement of Environmental Values, being considered. As the public comments on the proposal they will be able to compare it with the Statement of Environmental Values.

This raises the question of the broad application of the Environmental Bill of Rights and Environmental Registry System to government decisions. As mentioned at the outset several Ministries make what can be considered environmentally significant decisions. The Environmental Registry System is not only for proposed policies, regulations and instruments from the Ministry of the Environment. Many significant instruments with respect to the environment are issued by the Ministry of Natural Resources or the Ministry of Northern Development and Mines. The classification system with respect to instruments will therefore apply to several Ministries over time (see Chapter 5 - Transition).

An Electronic Registry

The Environmental Registry System should be operated by a government Ministry and managed by a Registrar, who would have responsibility for the day-to-day functioning of the Registry and would act as the principal point of contact for public inquiries.

The Environmental Registry System would permit interested members of the public to obtain notice of pending significant environmental decisions. It is expected that the system would be electronic and would contemplate the public being able to access its information from many locations. It is also expected that some members of the public will have a more regular interest in the Registry than others and may therefore wish to subscribe to the Environmental Registry System. This could entail automatic notice of certain types of decisions or simply access to specific pending decisions on request.

For example, an environmental group may wish to follow pending decisions with respect to "air emissions" or "wetlands". It would be possible in such a system for the group to "buy" electronic access to the Environmental Registry System that would automatically notify them of proposed policies, regulations or instruments on those issues. Such registrants could identify environmental decisions of interest based on geographic location, subject matter, industrial sector, or even applicant.

A central Ministry would be responsible for the overall maintenance and management of the software for the electronic registry. Each participating Ministry would be responsible for updating and editing the data and for appointing individuals that would provide a secondary point of contact regarding specific items on the Registry. Each Ministry would have on-line access to retrieve, update and edit the information in the Registry and to manipulate the information to support managerial functions.

The Registrar of the Environmental Registry System would also be available to provide advice to the public and Ministry staff regarding use of the Environmental Registry System. If fees are considered to be feasible or desirable for the use of such a system then the Registrar could invoice and collect them.

The Task Force was unable to make a recommendation on whether there should be fees levied or, if so, who should pay. Those who implement the recommendations should consider these questions. The Task Force makes the following observations.

It is possible that the costs of the Registry could be recovered through fees levied on the applicant, the registrant and the participating ministries. The equity and the practicality of levying fees on interested parties must be considered, as must the following factors:

- Applicants are typically charged a fee for the issuance of an instrument. Any fee levied on the applicant specifically for the Environmental Bill of Rights Registry would have to be added to existing fees and collected by the responsible ministry. Some mechanism would be required to ensure that these monies or their equivalents would be made available to the Registrar.
- It is recommended that some form of user fee be considered in order to reduce unnecessary use of the Registry. Registrants could be charged a flat fee for the service, probably on an annual basis. However, if a fee was not levied on those that make ad hoc inquiries of the system, there would be a substantial incentive to not register. Fees for ad hoc inquiries would be much more difficult to administer and may not be cost effective.
- Ministries would themselves be users of the Registry. Their effective and ineffective use of the Registry could have substantial cost implications. Consideration must be given to the need for user charges (or cost accounting) to the Ministries over and above the charges made to the applicants and the registrants.

While the Task Force was considering this issue, the Ministry of the Environment announced on May 12, 1992 its plan to introduce fees for certificates of approval for commercial, industrial and private sector undertakings which require approval under the *Environmental Protection Act* or the *Ontario Water Resources Act*. The Ministry anticipates that fees could generate almost $1 million this fiscal year and more in 1993-94. The Task Force suggests that a relatively simple, cost effective and user friendly system be employed to finance the registry. It is recommended that the details of this system be finalized during the detailed design and implementation stages.

Notice

Once a proposed decision is registered on the Environmental Registry System it would need to meet certain minimum standards of notice to the public and opportunity to comment. The needs in this respect would vary from policies to regulations to instruments. In particular the needs would vary between different classes of instruments.

The minimum requirement for public participation in environmentally significant decisions would be as follows:

- notice of a proposed decision on the Environmental Registry System,
- a 30 day period for comment by the public, and
- where comments have been received, the publication of notice of the decision and details about its availability on the Environmental Registry System with a concise explanation of the way in which comments were considered.

The Task Force considers it sufficient that, as a minimum standard, notice and comment be provided only once in the public participation process. Notice ensures that the public is made aware of the pending decision and allows interested persons to identify themselves and make their views known. Typically, if there is sufficient public concern, subsequent opportunities for comment and review are provided and the responsible ministry generally ensures that public concerns have been adequately addressed by the applicant prior to issuing the instrument.

It is proposed that interested parties be given a minimum 30 day period from the day of notice within which to provide comments. The responsible minister would have the discretion to provide a longer period of time if it is considered appropriate.

Notice should include the following information:

- in the case of an application for an instrument, the name and address of the applicant;

- a concise explanation of the proposed policy, regulation or instrument;
- a contact name, address and telephone number within the responsible ministry;
- the location of the facility for which the application is being made; and
- the statutory authority for the decision.

In the case of policies and regulations, it is recommended that notice be given when the draft policy or regulation is available for comment, at the very latest. Provision should be made for notice at an earlier date should the responsible minister believe it to be appropriate.

In the case of an application for an instrument for a private sector or a government undertaking, it is proposed that notice be given no later than when an application for the instrument is accepted as complete by the responsible ministry. Providing notice at an earlier stage is encouraged in order to ensure that input by interested parties is most effective. A "fast tracking" option is provided for when early notice is provided by the applicant. This is outlined in a section below entitled "Fast Tracking".

When the provincial government proposes to issue an instrument such as a control order under the *Environmental Protection Act*, provisions similar to those which cover the private sector would apply. In these cases, notice must occur, at the latest, when a draft instrument is available for comment. Notice at an earlier stage could be provided at the discretion of the responsible minister if considered appropriate.

Once notice has been provided, the onus is on the registrant to indicate further interest.

It should also be understood that the Registry cannot meet the full requirement for notice in every case since:

- neighbours to a potential undertaking cannot be expected to have registered for the purpose of receiving notice on local undertakings; and
- in many cases, local notice must include substantive materials to be considered by the individual receiving notice.

To this extent, the Registry should provide the minimum amount of notice. More extensive forms of notice that are most appropriate to the type of proposed decision may be needed in some cases. These are generally provided for in the legislation governing the issuance of the instrument in question and could involve direct mail, leaflets or other forms of notice.

Comment

It is intended that the public have, as a minimum right, the ability to submit written comments on any pending decision that is registered. In cases where comments have been received, the reasons for the decision and the way in which comments have been considered in making the decision would be prepared and made available to all interested parties. It is not recommended that reasons be prepared where no comments have been received since doing so would represent a substantial investment of resources that would not generate comparable benefits.

The application and supporting documentation would be made available for review at the offices of the responsible ministry or through the mail, depending on the circumstances of the policy, regulation or instrument in question.

Freedom of Information and Protection of Privacy Act (FOI Act)

In making information submitted by applicants available to the public, consideration must be given to the implications of the *Freedom of Information and Protection of Privacy Act*. Technically, third party information is not entitled to protection from release under the provisions of the *F.O.I Act* unless that Act is specifically invoked by the person who originally provided the information to the government.

Once an *FOI Act* access request and supporting documentation is made and prior to the release of the requested information, the information must be screened to determine if its release would be constrained under the provisions of the *FOI Act*. Typically, persons who have provided information to the government wish to invoke the mandatory exemption of third party information where disclosure could reasonably be expected to cause harm to those persons for certain portions of the submitted information. In fact, some may argue that if third parties know that the person intends to undertake certain works, even this could be detrimental to that person. Government traditionally respects a person's claim for confidentiality of third-party information it provides to government, because this is often necessary to obtain full disclosure and achieve the government's regulatory objectives.

Providers of information to the government would generally not be allowed to restrict access to all information, although this may be a matter to be decided by the Freedom of Information Commissioner. Some portion of their application for an environmental instrument may be made available. Should there be a disagreement between the responsible ministry, the applicant for the information or the provider of the information, further notice to the applicant and the provider and an opportunity to make representations would be required. Ultimately, a referral to the Freedom of Information Commissioner may occur. The Freedom of Information Commissioner may order the release of information where the public interest outweighs the need for confidentiality or where it is determined that the information does not warrant protection. This process can be very time consuming but necessary to ensure adequate protection to the applicant and limit government liability.

It is recommended that where the *FOI Act* is a consideration, ministries should employ a three part application for an instrument as follows:

- Part A - Automatically available to the public;
- Part B - Information that may be considered exempt under the rules of third party exemptions;
- Appendices - Additional information in support of the application.

If confidentiality is a concern then providers of information to the government would be asked to identify, at the time they submit their application for an environmental instrument, those portions of Part B and the appendices they wish to exempt from release under the *FOI Act*. The release of these portions would require an FOI review. However, such FOI reviews should not delay the approval of the environmental instrument, and administrative procedures must be developed to ensure that this objective is achieved.

For example, the Ministry of the Environment currently receives approximately 400 FOI requests per year of which approximately 50 relate to Certificates of Approval.

Policies

Notice regarding a proposed policy and a 30 day comment period would be given prior to the policy being adopted as official. It is anticipated that notice will be provided when a draft policy is available for consideration by the public. Its release may in some cases be accompanied by a discussion paper to assist the public in its review.

The responsible Minister should have the discretion to provide additional notice to the public, for example, in the form of advertisements, extended periods of public comment and different opportunities for comment such as open houses and public meetings.

The Minister would be required to take every reasonable step to ensure that all comments relevant to the proposal that are received as a result of public participation are considered when decisions are made (see s.20 EBR).

Regulations

It is intended that regulations be handled in a manner similar to that of policies. A notice of intent to regulate could be made. The notice must provide for a minimum 30 day comment period prior to the regulation being enacted. The Minister should be required to place notice on the Registry if it could have a significant impact on the environment (see s.14 EBR).

A "Regulatory Impact Statement" may also be required in appropriate cases containing the following information:

- a statement of the objectives of the proposed regulation;
- a preliminary assessment of the environmental and economic impacts of the proposed regulation; and
- the reasons why regulation is the preferred means to achieve the desired environmental objective.

The Regulatory Impact Statement would be made available through the responsible ministry but could be dispensed with if a Minister considered it to be unwarranted.

As with policies, it should be possible to undertake consultation on a regulation before it has been fully drafted. In this instance, the notice of intent to regulate would be made at the discretion of the Minister and consultation would occur in a manner similar to that provided for a comparable policy.

Instruments

It is intended that four Classes of Instrument be established for the purpose of defining the level of public participation to be provided for in the decision making process. These are as follows:

Class I	Notice and Comment
Class II	Enhanced Notice and Comment
Class III	Discretionary Hearing/Negotiated Instrument
Class IV	Mandatory Hearing

The Classes are intended to provide a continuum of increasing public participation from simple notice and comment through the Registry to a full public hearing before an independent tribunal. They provide a framework for public participation in decision making by the government of Ontario. As such, they provide guidance which, if applied to all significant environmental decisions, would provide the uniformity, predictability and consistency in public participation that the public needs and that government wants to provide (see ss.76(1)(i)(j)(k)(l)(m) EBR).

Each Class is defined to include instruments that meet certain criteria, as follows:

Criteria

In establishing the four Classes of instruments, there was a need for a conceptual framework that could be used to determine the significance of the decision and therefore the degree of consultation required. It is suggested that four criteria be used for this purpose, as follows:

(a) potential for significant environmental impact;
(b) geographic extent of significant environmental impact (i.e., local, regional, and provincial);
(c) public interest in the decision to be made (i.e., local, regional, and provincial); and
(d) provincial policy interest in the decision to be made.

(a) Potential for Impact

The Environmental Bill of Rights applies only to those instruments that have the potential for significant environmental impact. In many instances, significant environmental impacts are possible, but not always probable. In other circumstances, the environmental impacts are real and can be reduced, but not totally avoided. The four classes are rated against this continuum.

(b) Extent of Impact

The area that may be affected by an undertaking may be very local or the undertaking may have regional or even provincial effects. Local impacts are considered to be ones that only affect immediate neighbours and will not extend much beyond them. Regional impacts are considered to be those that may affect areas well beyond the immediate neighbours and extend to perhaps more than one community or municipality. Provincial impacts are those that have the potential to extend well beyond the local municipality.

(c) Public Interest

Public interest in an instrument is an important factor in deciding the degree of consultation that is required. Local interest is considered to extend beyond the immediate neighbours to the undertaking but remain within the community. Regional interest is deemed to be interest that goes beyond the local community but largely remains within the local municipality. Provincial interest is considered to exist when public interest extends beyond the local municipality.

(d) Provincial Policy Interest

The Province of Ontario has varying degrees of policy interest in decisions that are environmentally significant. Generally, the larger the undertaking and the greater its potential impact, the greater the Provincial government interest in the decision to be taken. For example, the installation of a small boiler for space heating is generally of little interest to the Province. The installation of an incinerator for hospital waste is of high provincial interest. However, there may be circumstances where, while provincial government policy interest is high, direct environmental consequence is much lower in relative terms.

Using the Criteria in Categorizing Instruments by Class

The level of public participation should correspond with the magnitude of the environmental decision to be made. Classification would be based on a balanced evaluation of all four criteria. Generally, no one criterion will mandate the placement of a class of instruments into any one category. For instance, substantial public interest in an activity that has only local implications should not automatically be considered to warrant a public hearing. Hearings are expensive and should be restricted to the most important significant environmental decisions to be made.

Table 1 summarizes the criteria as they are applied to each of the four classes of public participation.

TABLE 1

INSTRUMENTS - CLASSES OF PUBLIC PARTICIPATION

CRITERIA

	CATEGORY OF CLASS			
	I	II	III	IV
Environmental Impact	Potential impact seldom occurs - mitigative measures are routine and effective	Demonstrated potential impact seldom occurs - mitigative measures are routine and effective	Demonstrated potential impact requiring moderate to significant mitigative measures	Demonstrated potential impact requiring moderate to significant mitigative measures
Geographic Extent of Impact	Local significance	Local significance	Regional significance	Regional or provincial significance
Public Interest	Limited - generally localized to immediate neighbours	Potentially widespread - may extend beyond immediate neighbours	Potentially widespread - generally extends beyond the local community	Potentially widespread - generally of provincial interest
Provincial Government Interest	Low	Low to moderate	Moderate to high	High

A Class of Instruments Not Covered

It may be useful to mention those instruments that are not subject to the provisions of the Environmental Bill of Rights. This group would include instruments issued under environmental legislation that are either not scheduled or represent a sub-group of a scheduled instrument that is considered to have insignificant environmental impacts. By and large these are instruments that meet the following criteria:

- there is little potential for significant environmental impact or where experience has demonstrated that these impacts rarely occur;
- the impacts are primarily local, and do not normally extend beyond the boundary of the applicant's property;
- public interest is relatively limited and generally localized to adjacent neighbours; and
- there is little or no provincial policy interest in that type of undertaking (see s.76(1)(m) EBR).

An example of this Class of instrument is a Certificate of Approval for a Sewage Systems with a capacity of less than 4500 litres per day, issued under the *Environmental Protection Act*, Part VIII.

Instrument Classification

Class I - Notice and Comment

It is recommended that Class I include all instruments that have:

- the potential for significant environmental impact but where experience has demonstrated they do not normally occur and where mitigative measures are routine and effective;
- the impacts can be considered to be primarily of local significance and may be subject to an appropriate level of review at the municipal level;
- public interest is relatively limited and generally localized to adjacent neighbours or the local community; and
- there is a relatively low level of provincial policy interest in that type of undertaking.

The responsible Minister must provide for minimum notice and comment in these cases.

An example of this Class of instrument is the issuance of Certificates of Approval for Class A Sewage Systems with capacities greater than 4500 litres per day, issued under the *Environmental Protection Act*, Part VIII.

[NOTE: It is not recommended that all 40,000 Environmental Protection Act, Part VIII sewage system (septic tank) approvals be subject to the provisions of the Environmental Bill of Rights since:

- *the vast majority are only of local interest and potential impact;*
- *review is best achieved at a local level;*
- *provincial interest in individual decisions is relatively low;*
- *the environmental problems associated with cumulative impacts of many systems in close proximity is best achieved through the land use planning process.]*

The Environmental Bill of Rights should provide the responsible minister with the ability to reclassify individual instruments from Class I to Class II provided comment is received substantiating material concerns that significant environmental impact will occur, or that there is widespread public concern over the undertaking. Reclassification of Class I instruments to a class greater than Class II is not recommended given that the instrument is only of local interest and may only have local impacts by definition.

Class II - Enhanced Notice and Comment

It is recommended that Class II include all instruments that have:

- the potential for significant environmental impact but where experience has demonstrated they do not normally occur and where mitigative measures are routine and effective;
- the impacts can be considered to be primarily of local significance and may be subject to an appropriate level of review at the municipal level;
- the potential for widespread public interest is high and may extend beyond immediate neighbours; and
- there is low to moderate provincial policy interest in that type of decision.

An example of this Class of instrument is the Section 18 Director's Order for Preventative Measures, under the *Environmental Protection Act* where the nature of the undertaking or the risk of a discharge of a contaminant is such that the environment will likely be harmed.

At the discretion of the responsible minister, provision may be made for additional public participation. This may include one or more of the following:

- an open house;
- public meetings;
- the appointment of an environmental mediator on consent of the parties;
- the appointment of a local, independent tribunal to make recommendations to resolve conflicts between the applicant and other local interests provided they do not compromise minimum standards for environmental protection that the responsible minister deems necessary for approval to be given;
- other forms of "alternate dispute resolution" (ADR) techniques that may seem appropriate for the resolution of outstanding issues between the parties.

No provision has been made for the reclassification of instruments from Class II to either Class I or Class III. It is intended that Class II include only those instruments which would not require a hearing since they are of only local or regional interest.

Class III - Discretionary Hearing

It is intended that Class III include those instruments that typically control undertakings that have:

- demonstrated potential for significant environmental impact that requires moderate to significant mitigative measures in order to ensure that these impacts are not realized;
- impacts that are of regional significance and local reviews would normally prove inadequate;
- the potential for widespread public interest is high and generally extends beyond the local community; and
- there is moderate to high provincial interest in that type of undertaking.

It is suggested that this Class of instrument be limited to those that currently are subject to discretionary hearings,subject to any reclassification exercise a Ministry may undertake in the future to implement the

Environmental Bill of Rights. Given the enormous resource requirements of hearings, any decision to expand the number of instruments that may be referred to hearings must be made very carefully.

An example of this Class of instrument is the issuance of Certificates of Approval for sewage works under Sections 53, 55(1) of the *Ontario Water Resources Act*, where the sewage work is established or extended within a single municipality and where the work is not otherwise approved under the Municipal Environmental Class EA.

It is recommended that this Class have the same provisions for public participation as Class II with the proviso that the responsible minister may require parties to a potential hearing to participate in a mediated negotiation prior to the decision being referred to the tribunal. The mediator would provide guidance to the responsible minister as to the substantive issues in question which could be used to limit the scope of the hearing. Liaison will be required with the Environmental Assessment Program Improvement Project to ensure consistency.

Class IV - Mandatory Hearing

It is recommended that Class IV include those instruments that have:

- demonstrated potential for significant environmental impact that requires moderate to significant mitigative measures in order to ensure that these impacts are not realized;
- the impacts can be considered to be of regional or provincial significance and are unlikely to be subject to an appropriate level of review through local reviews;
- the potential for widespread public interest is high and generally of a regional or provincial significance; and
- there is high provincial interest in that type of undertaking.

As with Class III, it is suggested that this Class of instrument be limited to those that currently are subject to mandatory hearings.

An example of this Class of instrument is the Certificates of Approval issued under Section 30 of the *Environmental Protection Act*. The Director must require the Environmental Assessment Board to hold a hearing before issuing or refusing to issue a Certificate of Approval for sites for the disposal of hauled liquid industrial waste, hazardous waste or waste that is the equivalent to domestic waste of more than 1500 people.

The four Classes presented above provide a framework for public participation in decision making. Each represents an independent model for public participation that is appropriate for instruments that meet the prescribed criteria. As such, the Classes provide guidance as to what level of public participation is appropriate for any group of instruments.

First and foremost, the classification scheme will present a framework for public participation in government decision making as it relates to the environment. Ultimately, it may prescribe very specific public participation requirements at the level of individual instruments. The balance that is struck between these two poles may be very important to the ultimate success of the Bill.

The Task Force also understood that the Environmental Bill of Rights should not establish a public participation process that will either:

- require an additional layer in the decision making process; or
- employ a complicated set of regulations to bring existing decision making processes into compliance with the requirements of the Environmental Bill of Rights instead of establishing a principled model against which existing and future legislation can be measured.

Consolidation of Public Participation in Applications (Multi-Media)

Provision can and should be made in the Environmental Registry System to allow applicants to consolidate public participation activities of instruments if there is more than one instrument issued for any one facility. The instruments would then be subject to the level of public participation required of the highest Class of instrument that has been included in the consolidation. The consolidation of instruments is a program issue that need not be addressed within the legislation but it should be developed as a means of increasing the efficiency of the system for applicants (see s.76(1)(n)(o) EBR).

The Task Force learned that the Ministry of the Environment, as a part of its pollution prevention initiative, has undertaken a multi-media/pollution prevention approvals project. The purpose of the project is to assess the feasibility of integrating pollution prevention and multi-media approach into the approvals process under the existing regulatory framework. The project would also identify changes in the regulatory structure required to implement multi-media/pollution prevention into the approvals process on a permanent basis.

The existing regulatory structure is largely medium-specific. Individual standards and limits are established based on each medium by different programs within the Ministry. It is hoped that the review of the five proposed pilot projects will enable the Ministry to use a multi-media approach that stresses overall reduction of chemical use and pollutant generation.

The project consists of the issuance of approvals incorporating the concepts of pollution prevention and multi-media assessment. Those selected will provide a cross-section of typical applications for industrial manufacturing facilities currently encountered in the approvals process and will include the following:

- an existing complex integrated site having air, waste water and waste management approvals,
- an existing site having an air and waste water approval,
- a simple new "green fields" type proposal,
- a plant expansion, and
- a plant modification.

This type of approach is supported by the Task Force and offers a variety of incentives such as:

- consolidation of various approvals processes into one facility approval process resulting in improved administrative requirements for future approvals and better compliance tracking by the company,
- pre-approval or exemption from approval for minor changes to facility for facilities undertaking pollution prevention measures,
- a commitment to fast-track recommendations of the Approvals Reform initiative, discussed below.

Consistent with the goals of this Task Force's recommendations, the public will be kept advised of the progress of the pilot projects through periodic updates. The final report is also scheduled to be released to the public.

Fast Tracking

Consideration was given to the possible incorporation of a "fast track" for the issuance of instruments. The goal is to offer incentives to a private sector applicant who provides for public consultation at the earliest stages of decision making through a reduction of the requirements for public participation at later stages in the process.

For an instrument to be eligible for "fast-tracking", it is assumed that the applicant has provided for notice and public comment that meet all of the Environmental Registry System requirements for that class of instrument. The applicant may go so far as to enter into negotiations with interested parties and arrive at an agreement regarding the proposed course of action which would accompany the application. Should this be done, the Government may undertake to use its best efforts to issue the particular instrument in a timely fashion (see s.76(1)(j)-(o) EBR). The applicant would not be allowed to avoid the requirements of the responsible ministry by entering into agreement with local, interested parties.

The Task Force heard that although the government would like to guarantee certain turn-around times for the issuance of instruments, it is often not in the position to do so because of resource constraints. This is not to say that the government is uninterested in slow turn-around times. Several initiatives are currently under way to speed up the issuance of instruments in areas where this is a problem.

The Task Force learned of current efforts in the Ministry of the Environment to streamline the existing approvals process and supports those efforts. The goal of the proposed "re-engineering of the approvals program" is to streamline and simplify the process. Once implemented, it is expected that a substantially improved approvals turnaround time will be provided to clients of the Ministry of the Environment. The program is to be developed with a view to incorporating other new initiatives such as pollution prevention and the "multi-media" approach discussed above.

The Environmental Registry System and Alternate Dispute Resolution

The role of alternate dispute resolution in the Environmental Registry System arises in two ways. First, the Task Force wishes to emphasize that a person with an environmental concern should always take any and every opportunity to work things out informally without resort to the courts, tribunals, investigations and other more formalized procedures. Consensus based decision-making is an important element of the Environmental Bill of Rights. By learning everyone's views, needs and interests a solution can be developed to suit all interested parties. A facilitation of this goal by government would go a long way to ensuring an effective implementation and use of the Environmental Bill of Rights over time.

Secondly, the Environmental Registry System contemplates the use of Alternate Dispute Resolution in the resolution of issues arising in Class II and III instruments. The government will need to develop, in consultation with interested groups, the specific procedures by which instruments may be negotiated.

The process to develop the "Alternate Dispute Resolution" procedures should consider, among other issues:

- the need for guidelines to assist Ministries to identify instruments, circumstances or disputes which are appropriate for alternate dispute resolution,
- the need for guidelines to assist users with selection of the appropriate process - mediation, arbitration, or direct negotiation,
- how Ministries will manage such processes, ensuring proper representation, assignment of skilled third-party neutrals and funding of the process,
- the establishment of a registry of such third-party neutrals for use by Ministries,
- the structure and content of negotiated settlements and the need for ratification or review of their conclusions to protect the public interest,
- the timing for use of such processes, whether they should be voluntary and rules for exchange of documents, and
- how material about alternate dispute resolution can be made available to potential users.

Notification of Decision

Once a decision has been made and reasons prepared in response to comments, any party that had provided comment should receive notice that a decision has been made and be provided access to a copy of the instrument and the reasons for the decision. The form of access may vary depending on the policy, regulation or instrument. It could take the form of making the materials available in government offices, mailings or some form of electronic retrieval. Depending on the final design of the Registry, the Registrar may provide notice as part of the normal mailings.

It is not recommended that the responsible ministry or the Registrar provide a written response to every person who provided comment. To do so would be very costly. As an example, the Task Force learned that the Ministry of the Environment received over 3,000 letters of comment on its proposals for the control of "grey water" discharged from boats. Many of these were "form letters" sent by fax. To provide individual responses to each would not be very cost effective when other forms of publicizing the decision would be more appropriate.

No Appeals - Policies and Regulations

While many proposals for policies and regulations will be placed on the Environmental Registry System, the Task Force does not recommend any new rights of appeal or review for any decision made at the conclusion of a period of public notice and comment.

As will be seen in an upcoming section (see Chapter 3(B)(ii)), there is a recommendation for oversight of the Environmental Bill of Rights and Ministerial use of the Environmental Registry System by an Environmental Commissioner. He/she would be able to comment on, for example, a failure to apply the Statement of Environmental Values in a particular policy decision or regulation.

Appeals - Instruments Class I and II

The Task Force considered the possibility that, with thousands of instruments being considered on the Environmental Registry System each year, some decisions will inevitably require review.

Class I and II instruments are issued as a result of a decision by government, unlike Class III and IV instruments, which may be or are issued as a result of a decision by an independent tribunal. At present, the applicant for a Class I or II instrument may have a right to appeal government's refusal to issue an instrument or the imposition of terms and conditions in the instrument. Similarly, a person ordered to do something by government may have a right to appeal the imposition of that order, or its terms and conditions. Where the current law provides an existing right of appeal for the applicant/orderee, it does not provide a comparable appeal right for a non-applicant/orderee.

The Task Force recommends that where applicants or orderees have a present right of appeal, interested or affected members of the public should have a right to seek leave to appeal. In the Ministry of the Environment, this would provide such persons with access to seek leave to appeal to the Environmental Appeal Board.

A non-applicant member of the public should have the ability to seek leave to appeal the instruments to a tribunal on the grounds that he/she participated in the consultative process and the instrument as issued is unreasonable having regard to the specific Act, the regulations (if any) and policies which govern the issuance of the particular instrument. It is not proposed that non-applicants have appeal rights with respect to instruments where applicants have no right to appeal.

The application for leave to appeal should be filed within 15 days of the date of the decision to issue the instrument.

This application for leave to appeal should be heard by a single member of the Environmental Appeal Board. On the application for leave the non-applicant must first satisfy the tribunal that he/she has "standing" to challenge the instrument. "Standing" in this context means the board should accept a person on the application if he/she is acting in good faith and has a "demonstrable interest" in the issuance of the instrument. This entitlement to standing should be evident from that person's participation in the public consultation on the instrument in the Environmental Registry System. It will also be necessary for the person to satisfy the Board that the appeal has "preliminary merit" meaning that there is a *prima facie* case that the instrument, as issued, is unreasonable and requires review. The Board, for example, could apply a test that "no reasonable person could have made such a decision having regard to the policies, the guidelines, regulations or Acts governing issuance of this instrument".

If leave is granted the Board should then review the approval or instrument in question and consider, if the change, for example, would be of a minor nature, most efficiently done by the Board, whether to substitute its own decision for that of the Ministry, or send the instrument back for reconsideration.

An applicant's appeal rights would remain unchanged and, in terms of the actual process, the Task Force recommends that the hearing of any new appeal be conducted by the Environmental Appeal Board or other prescribed tribunal in the same way as on the appeal by an applicant.

Appeals of Instruments and the Environmental Appeal Board

An important aspect of the appeal procedures concerns the use of the Environmental Appeal Board which is currently available for review of instruments issued pursuant to legislation within the Ministry of the Environment's jurisdiction. The resource demands that this may make on the Environmental Appeal Board should be monitored closely.

Over time, other ministries will join the Environmental Registry System and instruments within their jurisdiction will require classification pursuant to the above system and, inevitably, there will be appeals. The Task Force recommends that the Environmental Appeal Board or a tribunal equivalent to it be available for consideration of such appeals of Class I and II instruments and for applications for leave to appeal. Whether existing tribunals can meet this need or whether the Environmental Appeal Board should be expanded the Task Force leaves to those who will implement the Environmental Bill of Rights.

The Task Force acknowledges the potential need for specific knowledge and expertise on the Boards that consider such appeals. This, in some cases, suggests specialized Boards for each Ministry. However there may be certain efficiencies and even benefits from having one "Instrument Appeal Board" to which all significant environmental instruments could be appealed in the way described above.

Appeals and Instrument Guidelines

The definition of "policy" used by the Task Force includes the concept of guidelines that are used by individual Ministries to issue instruments. The content of these guidelines can be quite technical and precise. In other cases the guidelines set out the points at which Ministry officials exercise their discretion in issuing the instrument or determining parts of it.

These guidelines are essential tools for officials who must consider and issue instruments for thousands of individual activities. Flexibility is often required so these guidelines do not lend themselves to the rigidity of a law or regulation. On the other hand the content of a guideline can be determinative of whether an instrument is issued. While they are only policies, they often have a determinative effect on the issuance of instruments.

Over time, as the guidelines themselves are given public review and comment (see upcoming section at Chapter 3(B)(iv), Applications for Review), they may become more precise or may even be converted into regulations. They will also be reflective of the Ministry's Statement of Environmental Values.

The effect that this will have upon appeals in years to come could be quite profound. If these guidelines are well understood, are more precise and reflect the purposes of the Environmental Bill of Rights (by way of the Statement of Environmental Values) then the outcome of appeals could be much more predictable. After a great deal of experience with the Environmental Registry System, it may be decided that instruments based upon guidelines could ultimately be appealed primarily on the basis of whether they are unreasonable considering the guidelines. This in itself could contribute to the efficiency and certainty of instruments once issued.

Appeals/Reviews - Class IV Instruments

Class IV instruments provide for the highest level of public participation. The criteria for such classification includes a mandatory hearing before an independent tribunal. Under the current law an applicant for such an instrument may have a right to a review of the decision by the Divisional Court of Ontario on specific grounds. The Task Force makes no recommendation to change existing appeal/review rights or processes.

Members of the public involved in Class IV mandatory hearings for instruments also have a limited power to challenge the decisions of independent tribunals. The Task Force makes no recommendation to change existing appeal/review rights or processes.

Class III instruments also contemplate the possibility of a discretionary hearing by a tribunal. In that event the appeal rights would be as if it were in Class IV.

It is particularly important for the Environmental Bill of Rights to ensure that the public participation generated through the Bill be well focused on the important issues. For this reason, the Environmental Bill of Rights provides direction restricting the focus of public participation efforts to the decisions at hand in the issuance of the significant policy, regulation and instrument. The debate at the instrument level should not be broadened into a challenge of a higher level policy or regulation that gives rise to the need for that decision. To do so would undermine the ability of the Ministries to conduct their affairs in an orderly fashion.

For example, in the case of instruments, the public comment should be confined to the environmental implications of the decision to be taken and not be broadened to address larger issues. For the same reason, it is recommended that amendments to existing policies, regulations and instruments be subject to the provisions of the Environmental Registry System only to the extent that they materially change the significance of the potential impact on the environment.

The Task Force considered incorporation of the foregoing appeal rights for Classes I, II and IV directly into the Environmental Bill of Rights to underscore the importance of these new rights to the overall consensus.

As the classification system itself is not incorporated in the Environmental Bill of Rights (for reasons set out elsewhere) it was difficult to incorporate the appeal powers that flow from them.

The regulation-making authority contained in the proposed Environmental Bill of Rights sets out extensive powers to establish regulations to provide the appeals to the Environmental Appeal Board or other prescribed tribunal as well as to the Divisional Court contemplated by the Task Force (see s.76(1)(p) EBR).

The regulations would provide the authority for:

- who may appeal or seek leave to appeal,
- criteria for granting leave to appeal,

- grounds for appeal,
- intervention powers,
- time limits for such appeals, and
- the status of instruments pending appeals, and so on.

The Task Force expects public comment on this aspect of the consensus and foresees the possibility, even the future need, for the incorporation of the appeal powers directly into the Environmental Bill of Rights.

Environmental Registry System and Judicial Review

"Judicial Review" is the power of a court to review the legal validity of a decision of a board, commission, tribunal or other statutory decision-maker. In Ontario this power of the court to make orders that set aside such decisions as made by provincial authorities is an inherent power, codified in part in the *Judicial Review Procedure Act*, RSO 1990.

It will be recalled from the earlier discussion that the Task Force does not recommend that the application or non-application of the Ministry's Statement of Environmental Values be subject to judicial review. Nor should the use of the Environmental Registry System with respect to policies and regulations be subject to judicial review (see s.74(1) EBR).

However, the Task Force recommends that the Environmental Registry System requirements for placement of a proposal for an instrument on the Registry be considered a statutory duty that if not met, will be subject to judicial review (see s.74(2)(3) EBR).

Consistent with section 3 of the *Judicial Review Procedure Act*, the Task Force recommends that minor procedural irregularities in the issuance of a particular instrument should not affect the status or validity of an instrument.

However, where a Minister fails to put a prescribed instrument into the Environmental Registry System, or does not comply with the notice and comment requirements, or improperly exercises his/her discretion with respect to, for example, the emergency powers, then the instrument should be considered voidable by the court upon a judicial review application. The court would have the power to make the same orders which it is currently capable of making on a judicial review, including a declaration, setting aside of the decision and possibly sending the matter back for reconsideration. This application should be commenced within 15 days of issuance of the instrument.

Otherwise, no action, decision, failure to take action, or failure to make a decision by a Minister under the Environmental Bill of Rights should be reviewed by the court.

Relationship Between the Environmental Bill of Rights, Environmental Registry System and the Regulations

Throughout this section of the report reference has been made to "prescribed Acts", "prescribed regulations" and "prescribed instruments". The classification system itself with respect to proposals for instruments refers to "prescribed statutory provisions".

An understanding of the operation of the Environmental Registry System requires an understanding of the relationship between the Environmental Bill of Rights and its regulations. The Bill provides extensive regulation-making authority. Through the regulations much of the detailed infrastructure of the Environmental Bill of Rights will be provided.

The Task Force considered incorporating as much as possible of this infrastructure directly in the Environmental Bill of Rights itself. However the level of detail and other considerations, such as the need for a phased-in transition (see Chapter 5) and the need of a high degree of flexibility, convinced the Task Force that this would be best achieved through regulations.

It is recommended that the Environmental Bill of Rights eventually apply to not only the Ministry of the Environment but Ministry of Natural Resources, Ministry of Northern Development & Mines, Ministry of Agriculture and Food, and any other Ministries thought to be making "significant environmental decisions". Each of these Ministries makes thousands of decisions each year with respect to policies, regulations and instruments. As can be seen from the foregoing discussion of the classification system not every decision by government with respect to the environment requires public comment. The most efficient method for describing comprehensively those decisions which should be covered is through regulations that would add ministries to the Environmental Registry System, that would add new instruments within a class, and that would, for example, allow for movement by instruments from class to class. This level of detail simply could not be achieved in the Environmental Bill of Rights itself.

The essential components of the Environmental Registry System are the Registry itself, the decision to stream only significant decisions through it, the flexible levels of graduated notice and comment, the publication of decisions once made, the specific appeal rights, and the role of the Statements of Environmental Values in guiding the attitude of decision-makers.

The Task Force anticipates that during the period of public comment that will follow the release of this Report interested persons and groups (including Government), will review the Task Force consensus about the Environmental Registry System and its potential application to significant environmental decisions. During that period of comment a draft proposed regulatory framework should be developed by the Ministry of the Environment, illustrating exactly how the Environmental Bill of Rights and the Environmental Registry System will apply to their significant environmental decisions.

In Section E of this chapter, the Task Force sets out in more detail the way in which it envisages the Environmental Bill of Rights and Environmental Registry System applying to Ministry of the Environment and the Ministry of Natural Resources. This is a proposal that the Task Force submits to the public for further comment. Examples of instrument classification are set out for consideration.

The Task Force recommends that:

- ***the government establish an Environmental Registry System for significant environmental decisions being made by government,***
- ***it be used by all Ministries which make significant environmental decisions and should be phased in to apply to Ministry of the Environment, Ministry of Natural Resources, Ministry of Northern Development & Mines, Ministry of Agriculture and Food, and others as determined by Cabinet,***
- ***the Environmental Registry System be used to provide the public with notice of proposed policies, regulations and instruments that may have a significant effect on the environment and with timely opportunity to comment on the proposal,***

- *the Environmental Registry System provide notice of the decision made with respect to the proposal after the public has had an opportunity to comment,*
- *significant proposed policies, regulations and instruments should be handled through the Environmental Registry System in three separate components - a Policy Component, a Regulation Component and an Instrument Component,*
- *each component of the Environmental Registry System establish rules for providing minimum levels of notice (30 days) and timely opportunities to comment, as well as notice of the decision made,*
- *the Environmental Registry System apply to proposals for policies, regulations and instruments made after the Environmental Bill of Rights is in force. It should not be used to record decisions made before the Environmental Bill of Rights comes into force,*
- *the Environmental Registry System establish the minimum standard of public consultation on a significant environmental decision and, over time, all significant environmental decision-making processes in government should meet at least that minimum standard,*
- *the minimum requirements for public participation in an environmentally significant decision be notice of the proposed decision, a 30-day period for comment by the public and, where comments were received, the publication of the decision and the reasons for it,*
- *proposed policies placed on the Environmental Registry System for public comment include policies for any major program, plan, objective or guideline of the government with respect to the environment that may have a significant environmental impact and that the Minister responsible for that policy identifies as warranting public consultation,*
- *proposed regulations placed on the Environmental Registry System for public comment include regulations made under Acts listed in the regulations under the Environmental Bill of Rights that would have a significant environmental impact,*
- *the Minister have discretion to increase the length of notice and to establish methods of obtaining public comment for policies and regulations,*
- *proposed instruments placed on the Environmental Registry System for public comment include any document of legal effect issued under an Act and any licence, permit, approval, certificate of approval, control order, or other legal authorization, and is made under an Act listed in the regulations made pursuant to the Environmental Bill of Rights,*
- *significant environmental instruments be classified into four Classes (I to IV) which would reflect gradients of notice and opportunity to comment related to their significance,*

- ***the Environmental Registry System permit multi-media approvals, fast-track approvals and the use of alternate dispute resolution,***
- ***the classification scheme for instruments apply over time, to all Ministries which make significant environmental decisions,***
- ***the Environmental Registry System contemplate exceptions to the requirements to consult including:***
    - ***emergency situations;***
    - ***situations where public consultation on a significant environmental decision has been or will be achieved through an equivalent process; or***
    - ***situations where the instrument implements a decision which has been made by an independent tribunal or pursuant to the Environmental Assessment Act;***
- ***appeals to a tribunal by members of the public of Class I and II instruments should be permitted in certain circumstances,***
- ***Class IV instruments be subject to review by the Divisional Court of Ontario or as otherwise provided,***
- ***the Environmental Registry System be designed to scope the consideration of issues at each step of public comment.***
- ***any resident of Ontario be able to make an application to the court for a declaration that a Minister failed to comply with the Environmental Registry System requirements with respect to a proposal for an instrument within 15 days of notice of implementation of the proposal.***
- ***the Environmental Registry System should be implemented in a way that integrates the Freedom of Information and Protection of Privacy Act,***

It may be helpful at this point to consider the following chart which depicts the outline of the public participation aspects and the Environmental Registry System.

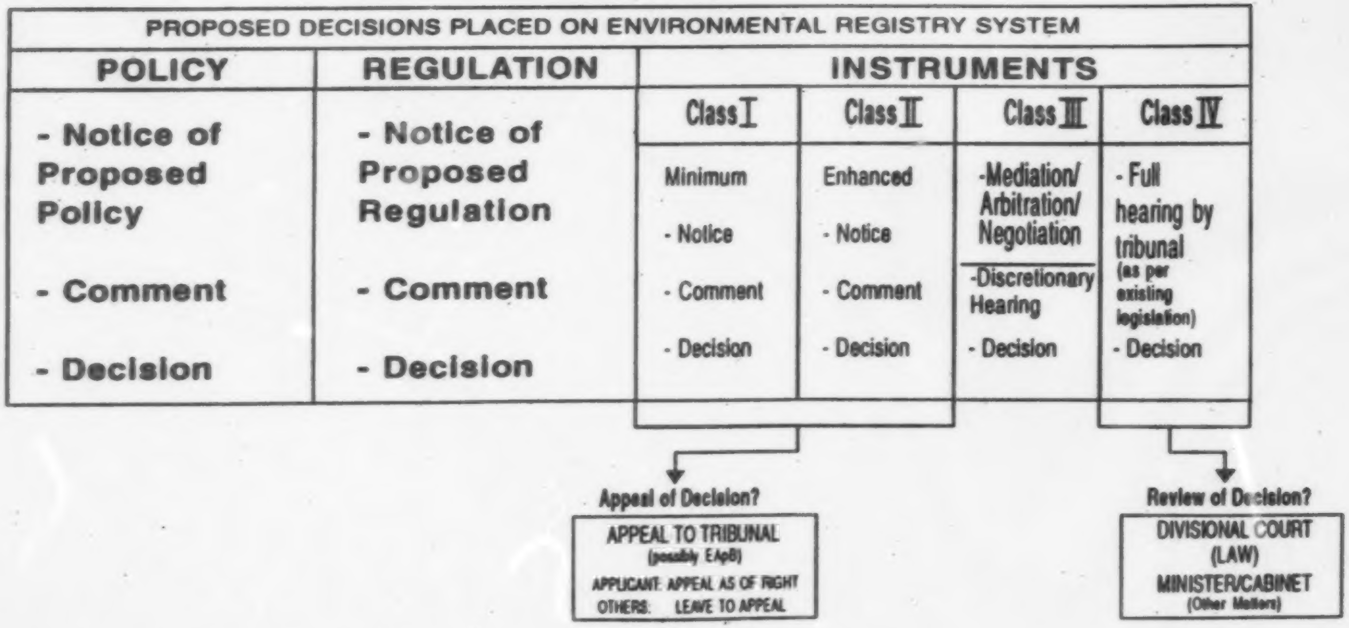
THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

PHASED IN TRANSITION BETWEEN 1993 AND 2000

MOE ⟶ MNR ⟶ MNDM ⟶ OMAF ⟶ OTHERS (AS DECIDED BY CABINET)

- EACH MINISTRY DEVELOPS A STATEMENT OF ENVIRONMENTAL VALUES - IN CONSULTATION WITH ENVIRONMENTAL COMMISSIONER, THE PUBLIC AND INTERESTED GROUPS.
- PUBLIC PARTICIPATION ON SIGNIFICANT ENVIRONMENTAL DECISIONS THROUGH CENTRAL ELECTRONIC REGISTRY SYSTEM.
- "DECISIONS" IN THREE CATEGORIES - PROPOSED POLICIES, REGULATIONS AND INSTRUMENTS.



PROPOSED DECISIONS PLACED ON ENVIRONMENTAL REGISTRY SYSTEM					
POLICY	**REGULATION**	**INSTRUMENTS**			
		Class I	Class II	Class III	Class IV
- Notice of Proposed Policy **- Comment** **- Decision**	**- Notice of Proposed Regulation** **- Comment** **- Decision**	Minimum - Notice - Comment - Decision	Enhanced - Notice - Comment - Decision	-Mediation/ Arbitration/ Negotiation -Discretionary Hearing - Decision	- Full hearing by tribunal (as per existing legislation) - Decision

Appeal of Decision?

APPEAL TO TRIBUNAL
(possibly EApB)
APPLICANT: APPEAL AS OF RIGHT
OTHERS: LEAVE TO APPEAL

Review of Decision?

DIVISIONAL COURT
(LAW)
MINISTER/CABINET
(Other Matters)

3. PUBLIC PARTICIPATION IN SIGNIFICANT ENVIRONMENTAL DECISION-MAKING BY GOVERNMENT

(ii) Office of the Environmental Commissioner

The Environmental Registry System discussed in the preceding section is based on the premise that through notice to the public, analysis of their comments and publication of decisions, government will make better, more sound environmental decisions. The transparency of the decision-making process would, it is hoped, contribute to greater accountability for the decisions made.

The Statements of Environmental Values within the various Ministries are designed to guide government officials in their thinking on significant environmental decisions. The Statements or their application are not designed to invalidate decisions that have been made that appear contrary to them. The Statements can act as powerful and influential guides but they cannot dictate decisions with respect to the environment. The goal is to create a "new attitude" in government when significant environmental decisions are made.

The flexibility of this approach is a very positive feature but the Task Force thought that it might also mean that the consequence of ignoring a Statement of Environmental Values could be fairly limited.

The Task Force considered this question of enforceability, not just in relation to the Statement of Environmental Values, but in relation to all aspects of the Environmental Bill of Rights. What consequence should there be for ignoring the Statement of Environmental Values or Environmental Bill of Rights? For exercising discretion inappropriately? For not consulting the public on significant environmental decisions?

How will the public know if the Statement of Environmental Values or Environmental Bill of Rights is even being applied? How can the government be held accountable for the use of the Environmental Bill of Rights?

The Task Force considered these questions and several possible approaches, including:

(a) media publicity - this method would leave non-application of the Statement of Environmental Values to publicity by the media. The public could then respond to the events publicized;

(b) the Legislature - this method would permit the Ontario Legislature, perhaps through a Standing Committee, to monitor or investigate Ministry or government use of the Environmental Bill of Rights or the Statement of Environmental Values;

(c) Ministerial Statements - this method would require individual Ministers, who are making significant environmental decisions, to account to the Legislature each year in "State of the Environment" addresses. This would create political accountability;

(d) the Judicial system - this method would permit individual citizens to apply to the courts or perhaps tribunals, to have significant environmental decisions reviewed. The court or tribunal could declare the decision to be void or voidable and thereby force government to revisit the issue;

(e) the "ballot box" - this method would leave it to residents to vote in general elections and by-elections against governments that make "poor" environmental decisions; and

(f) an Auditor/Commissioner of the Environment - this method was considered by the Ontario Round Table on the Environment and the Economy. It examined the establishment of the "Office of the Environmental Auditor" or "Commissioner of Sustainability" who would report every year on the sustainability of the environment with respect to decisions concerning budgets, policies, programs and action of all government ministries and agencies. The Task Force's thinking on this issue is consistent with the need for accountability of government through oversight by an objective and knowledgeable authority.

The Task Force recommends the establishment of the Office of the Environmental Commissioner of Ontario to address the need for objective oversight and the measurement of the implementation of the Environmental Bill of Rights and the use of the Statements of Environmental Values (see s.22-24 and 2.76(1)(q)(r) EBR).

The Task Force saw a variety of responsibilities for the Office of the Environmental Commissioner:

(i) providing the key ministries which make environmental decisions with an opportunity to draw on any expertise developed in the Office of the Environmental Commissioner and to obtain guidance or advice on proposed environmental policies and regulations,

(ii) providing ministries which make environmental decisions with guidance on the development and implementation of their individual Statements of Environmental Values,

(iii) providing education and guidance to those same ministries and their officials in understanding how to use the Statements of Environmental Values in their day-to-day decision making and how to develop self-auditing procedures with respect to environmental decisions,

(iv) providing periodic analysis and comment about whether environmental policies, regulations and instruments are actually being infused with the Statement of Environmental Values and, if not, how to ensure that they will in future,

(v) receiving, forwarding and monitoring the Applications for Investigation, the number of requests, their disposition, and user satisfaction with the process (see Chapter 3, section (B)(iii), Application for Investigation),

(vi) receiving, forwarding and monitoring the Applications for Review of government action, both with respect to the review of existing policies, regulations and instruments, as well as with respect to public requests for regulation of the environment where no regulations exist. The number and disposition of requests should be monitored, as well as user satisfaction with the process (see Chapter 3, section (B)(iv), Application for Review),

(vii) monitoring the use of the new statutory cause of action for environmental harm to a public resource (see Chapter 3(C),

(viii) monitoring the use of protections for employees who report environmental harm in the workplace and the number and disposition of complaints to the Ontario Labour Relations Board (see Chapter 3, section (D), Security for Workers Who Report Environmental Harm),

(ix) providing general oversight in monitoring of implementation of the Environmental Bill of Rights during phase-in transition (see Chapter 5, Dealing with Transition: Phasing in the Environmental Bill of Rights and Reviewing its Implementation),

(x) monitoring individual ministry use of the Environmental Registry and the exercise of ministerial discretion in placing policies, regulations and instruments on the Registry for public comment, the exercise of emergency powers and other related decisions.

This monitoring function with respect to government environmental decision-making should provide an objective foundation from which accountability for environmental decision-making would flow.

Some of the other approaches will continue to be available in any event - media publicity, accountability to the Legislature, Ministerial responses to the Environmental Commissioner and, ultimately, the ballot box - are all a part of a system designed to increase government accountability. Together with an Environmental Commissioner the Task Force believes these methods will lead to better, more sound, environmental decisions.

The Task Force considered and specifically rejected the concept of judicial review of the application or non-application of the Statement of Environmental Values as being less effective than an "Office of the Environmental Commissioner". It could also undermine the certainty, predictability and uniformity of the public participation system contemplated (see s.74(1).

In the final analysis, a Minister who ignores his/her Statement of Environmental Values, who ignores the public's role in environmental decision-making, who does not respond to Applications for Investigation or Applications for Review of government action in a timely or adequate manner, should be held accountable for his/her ministry's actions. The Environmental Commissioner should therefore publish periodic (biennial) reports about government performance, ministry by ministry, with respect to the Environmental Bill of Rights (see s.76(1)(q)(r) EBR). This type of objective, non-partisan analysis should lead to the political accountability which is implicit in the conceptual framework of the Environmental Bill of Rights.

The Task Force recommends that:

- ***the government establish an Office of the Environmental Commissioner of Ontario which should have responsibility for objective oversight and measurement of progress in implementing the Environmental Bill of Rights,***

- ***the Office of the Environmental Commissioner be accountable directly to the Legislature and be a non-partisan appointment,***
- ***the Office of the Environmental Commissioner also monitor and report on the use of the Statements of Environmental Values by various Ministries,***
- ***the Office of the Environmental Commissioner have responsibilities which include:***
  - ***(i) providing the key ministries which make environmental decisions with an opportunity to obtain guidance or advice on proposed environmental policies and regulations,***
  - ***(ii) providing ministries which make environmental decisions with guidance on the development and implementation of their individual Statements of Environmental Values,***
  - ***(iii) providing education and guidance to those same ministries and their officials in understanding how to practically implement the Statements of Environmental Values in their day-to-day decision making and how to develop self-auditing procedures with respect to environmental decisions,***
  - ***(iv) providing periodic analysis and comment about whether environmental policies, regulations and instruments are actually being infused with the Statement of Environmental Values and, if not, how to ensure that they will in future,***
  - ***(v) receiving, forwarding and monitoring the Applications for Investigation, the number of requests, their disposition, and user satisfaction with the process,***
  - ***(vi) receiving, forwarding and monitoring the Applications for Review of government action, both with respect to the review of existing policies, regulations and instruments, as well as with respect to public requests for regulation of the environment where no regulations exist. The number and disposition of requests should be monitored, as well as user satisfaction with the process,***
  - ***(vii) monitoring the use of the new statutory cause of action for environmental harm to a public resource,***
  - ***(viii) monitoring the use of protections for employees who report environmental harm in the workplace and the number and disposition of complaints to the Ontario Labour Relations Board,***
  - ***(ix) providing general oversight in monitoring of implementation of the Environmental Bill of Rights during phase-in transition,***

(x) monitoring individual ministry use of the Environmental Registry and the exercise of ministerial discretion in placing policies, regulations and instruments on the Registry for public comment, the exercise of emergency powers and other related decisions.

- *The Office of the Environmental Commissioner publish biennial reports about government performance, Ministry by Ministry, with respect to the Environmental Bill of Rights. This report should provide an objective foundation from which accountability would flow,*
- *Judicial review of a Ministry's application of the Statement of Environmental Values not be permitted.*

3. PUBLIC PARTICIPATION IN SIGNIFICANT ENVIRONMENTAL DECISION-MAKING BY GOVERNMENT

(iii) Applications for Investigation of Environmental Harm

As mentioned at the outset of this chapter, the proposed Ontario Environmental Bill of Rights is based upon an acknowledgement of a shared responsibility for environmental protection. We have examined already the potential role that residents could play through the Environmental Registry when they provide comments on proposals for significant environmental policies, regulations or instruments.

However, the public can also play an important role in detecting and reporting incidents of environmental harm. This occurs now on an informal basis. The Ministry of the Environment advises that its officials receive thousands of reports each year from members of the public who suspect that environmental harm has occurred or is occurring as a result of some activity. Allegations are made, investigations are conducted and in appropriate cases charges are laid which may, in turn, lead to convictions. The existing system works well in many respects. Informal contact with government with respect to suspected environmental harm is worthwhile and should be encouraged. There is wide agreement that this quasi-criminal sanction is an important deterrent for those who would otherwise risk harming the environment in their activities.

However, the Task Force identified a shortcoming in this area related to the uniformity, predictability and certainty of the current informal methods by which the public may trigger an investigation of suspected environmental harm when a more direct consideration by government is needed.

For example, a member of the public who alleges that environmental harm has occurred has no reliable way of knowing whether his/her complaint has been received, acted upon or even the outcome. If we expect the public to share the responsibility of environmental protection then government must respond in meaningful ways to public applications for investigation of environmental harm.

The Task Force does not wish to encourage the development of overly formalized "bureaucratic" processes that discourage rather than facilitate investigations. Nor does it wish to encourage frivolous or vexatious claims that consume scarce government resources. Every minor suspicion should not be reported, nor should it be investigated. But when reasonable people have reasonable grounds to believe an environmental offence or contravention has occurred they should be able to rely on a government response that acknowledges their allegation and advises them of the outcome. With these considerations in mind, and having regard for the Canadian *Environmental Protection Act*, the Task Force developed the following procedure:

Any two residents of Ontario who are eighteen years of age or older and who believe that a contravention of one of the prescribed Acts has occurred should be able to apply to the Environmental Commissioner for an investigation by the appropriate Minister (see s.32(1) EBR).

The Environmental Commissioner should provide a sworn standardized form for this purpose which would require the following information:

(a) the names and addresses of the applicants;
(b) a statement of the nature of the alleged offence;
(c) the names and addresses of each person alleged to have been involved in the commission of the offence, to the extent that this information is available to the applicants;
(d) a summary of the evidence supporting the allegations of the applicants;

(e) the names and addresses of witnesses to the alleged offence, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;

(f) a copy of any document and any material that the applicants believe should be considered in the investigation; and

(g) particulars of any previous contacts with the Office of the Environmental Commissioner or any Ministry regarding the alleged offence (see s.32(2) EBR).

The Environmental Commissioner should be required to forward the request to the appropriate Minister or Ministers (if the allegations were with respect to more than one of the prescribed Acts). The Environmental Commissioner should forward this "Application for Investigation" of a contravention within 30 days of receipt (see s.33 EBR).

Similarly the Minister should then be required to acknowledge receipt of the Application for Investigation of contravention from the Environmental Commissioner to the applicants within 30 days. Therefore, within two months, the applicant will know that the application has been received by the appropriate Minister (see s.34 EBR).

More important however is the Task Force recommendation that the Minister then be obliged to investigate all alleged contraventions unless,

(a) the application is frivolous or vexatious,

(b) the alleged contravention is not serious enough to warrant an investigation, or

(c) the alleged offence is not likely to cause harm to the environment (see s.35 EBR).

These grounds for disregarding an application will permit the Minister to control to some extent the application of resources to the more serious applications. A person who applies in order to harass his/her neighbour, the applicant who honestly suspects harm but the harm is not serious, or the person who requests an investigation of a contravention of a prescribed Act that is, for example, a "technical" violation but will not cause harm to the environment, will not require investigation if the Minister so determines.

Where the Minister decides not to investigate, for any of the above reasons, he/she should give written notice to that effect to the applicants, the person sought to be investigated and the Environmental Commissioner. This notice should be given within 120 days of the receipt of the application by the Minister from the Environmental Commissioner (see s.36(1) EBR).

Assuming the Minister intends to proceed with the investigation, he/she should, within 6 months of receipt of the application from the Environmental Commissioner, complete the investigation or give notice to the applicants providing a written estimate of the time required to complete it (see s.37 EBR).

If an extension of this time should be required, a further notice should be given to the applicants.

Finally, within 30 days of completing the investigation, which in some cases may be the laying of a charge, the Minister must give written notice of the outcome to the applicants, the person investigated and the Environmental Commissioner. This notice should inform those persons about the steps the Minister has taken or proposes to take (see s.38 EBR).

In summary, once an Application for Investigation of Contravention has been submitted to the Environmental Commissioner the following times will govern its progress:

•	Environmental Commissioner	30 days to send to relevant Minister(s);
•	Minister	30 days to acknowledge;
•	Minister	90 more days to determine whether to investigate and advise the applicant, the person alleged to have contravened and the Environmental Commissioner of the decision not to investigate;
•	Minister	60 more days to complete investigation (or extend time, if necessary);
•	Minister	30 more days to advise applicants, persons investigated and the Environmental Commissioner of outcome of steps taken.

The Task Force believes that these time lines will create a standardized, uniform and reliable system for public participation in "environmental investigations". The time limits provided are considered to be maximum time limits for responses by Ministries which, it is hoped, would respond as quickly as possible. It should be noted that the conduct of an investigation does not displace the government's ability to use administrative tools to abate any harm caused to the environment as a result of an alleged offence. In many cases, the government simultaneously investigates and takes steps to control environmental harm. The Task Force anticipates that any delay caused by the need to thoroughly investigate an allegation of quasi-criminal activity will not prevent government from otherwise addressing actual or likely environmental harm.

The recommended process is not intended to replace every other means of contact that residents have with environmental Ministries or the Environmental Commissioner. Many informal channels will continue to be used, including letters, telephone calls and in-person "tips", requests or suggestions for investigation. However, if the resident wishes to follow the progress of the Application for Investigation of Contravention he/she should use the recommended standardized process through the office of the Environmental Commissioner.

Application for Investigation of Contravention and the Office of the Environmental Commissioner

The recommendation to have all Applications for Investigation of contravention directed to the Environmental Commissioner is made because the Task Force believes that the individual Ministry responses to the Applications should be a subject covered in the Environmental Commissioner's biennial report to the Legislature. A "paper trail" will be created if the Environmental Commissioner receives the application, the Minister's decision on whether to investigate and the Ministry's report of the outcome. It is reasonable to expect an Environmental Commissioner to monitor the level of Ministry responses, the exercise of the Minister's discretion to investigate and the actual outcomes of investigations. Do Applications for Investigation lead to those who cause environmental harm being caught, prosecuted and convicted? If not, why not? The Environmental Commissioner after a reasonable time should be able to answer such questions and provide recommendations about the efficiency and effectiveness of the process.

The Task Force also realized that if the application for an investigation is based on an allegation of contravention of a prescribed Act then individual residents may not know which Ministry is responsible or which Act is being breached. The Environmental Commissioner should be able to ensure that timely and accurate Applications for Investigation are prepared by residents.

Application for Investigation of Contravention and Protecting Public Resources

As will be seen from an upcoming section concerning access to the courts by residents who wish to protect public resources, the Application for Investigation of contravention will play an important role in determining which resident may commence such proceedings where government has elected not to act to protect public resources and has demonstrated that election/decision, in part, by failure to respond to an Application for Investigation of contravention.

The Task Force recommends that:

- ***there be a standardized method by which two residents of Ontario who are 18 years of age or older and believe that a contravention of a prescribed Act regulation or instrument has occurred or will occur may bring their sworn Application for an Investigation to the attention of the appropriate Ministry or Ministries.***
- ***The Application for Investigation of a contravention be made to the Environmental Commissioner who should forward the application to the appropriate Ministry within 30 days.***
- ***The Environmental Commissioner use a standardized Affidavit form that records:***
  - ***(a) the names and addresses of the applicants;***
  - ***(b) a statement of the nature of the alleged contravention;***
  - ***(c) the name and address of each person alleged to have been involved in the commission of the contravention, to the extent that this information is available to the applicants;***
  - ***(d) a summary of the evidence supporting the allegations of the applicants;***
  - ***(e) the names and addresses of witnesses to the alleged contravention, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;***
  - ***(f) a copy of any document and a description of any material that the applicants believe should be considered in the investigation; and***

  (g) *details of any previous contacts with the Office of the Environmental Commissioner or any Ministry regarding the alleged contravention.*

- *A Minister who receives an Application for Investigation of a contravention from the Environmental Commissioner acknowledge receipt within 30 days to the applicants.*
- *A Minister investigate all Applications for Investigation of a contravention unless:*
  - (a) *the application is frivolous or vexatious,*
  - (b) *the alleged contravention is not serious enough to warrant an investigation, or*
  - (c) *the alleged contravention is not likely to cause harm to the environment.*
- *Where a Minister decides not to investigate he/she should advise the applicants, the person alleged to have committed the contravention and the Environmental Commissioner within 120 days of the Minister's receipt of the Application for Investigation of contravention.*
- *Where the Minister investigates the Application for Investigation of contravention he/she should complete the investigation within 6 months of receipt or such other time as he/she advises the applicants in writing.*
- *Within 30 days of completing an investigation the Ministry should advise the applicants, those alleged to have committed the contravention and the Environmental Commissioner, of the outcome, steps taken or steps intended to be taken.*
- *The Environmental Commissioner be prepared to assist residents with the completion of the standardized form to ensure accurate allegations with respect to prescribed Acts and other aspects of alleged contraventions.*

3. PUBLIC PARTICIPATION IN SIGNIFICANT ENVIRONMENTAL DECISION-MAKING BY GOVERNMENT

(iv) Applications for Review of Policies, Regulations and Instruments

The Environmental Registry is designed to ensure that policies, regulations and instruments proposed after proclamation of the Environmental Bill of Rights flow through a system that provides notice, an opportunity to comment and a decision. This, it is hoped, will infuse future policies, regulations and instruments as they are proposed after Proclamation with the concepts contained in the Environmental Bill of Rights through the Ministry-specific Statements of Environmental Value.

The Task Force considered the best means by which existing policies, regulations and instruments could be subjected to a review through the Environmental Registry which would, over time, infuse all policies, regulations and instruments with the purposes of the Environmental Bill of Rights and the Statements of Environmental Value.

Residents in the Province are currently able to write to appropriate Ministries suggesting a consideration or reconsideration of a policy, regulation or particular instrument. As in the case of the Application for Investigation these informal contacts between government and the public work well and should be encouraged. However the process by which citizens may request such reviews is not standardized in a uniform and predictable way. The Task Force considers this to be a shortcoming, particularly for significant reviews, and proposes to strengthen the existing system through the establishment of a standardized method for residents to request a review of existing significant environmental policies, Acts, regulations or instruments that, in their opinion, require amendment, replacement, repeal or revocation in order to protect the environment.

Similarly because there are activities carried on in the Province that are unregulated and may have a significant impact on the environment, the Task Force considers it appropriate to standardize a procedure by which residents may also request of government that a new policy, Act, regulation or instrument be adopted, passed, made or issued in order to protect the environment.

With these considerations in mind, the Task Force recommends the following guidelines for residents requesting government action with respect to significant policies, Acts, regulations or instruments.

The Task Force recommends that any two residents of Ontario who are eighteen years of age or older who believe that an existing policy, Act, regulation or instrument should be amended, replaced, repealed or revoked in order to protect the environment should be able, on sworn declaration, to apply to the Environmental Commissioner for a review of that policy, Act, regulation or instrument by the appropriate Ministry (see s.25(1) EBR).

Similarly any two residents of Ontario who are eighteen years of age or older and who believe that a new policy, Act, regulation or instrument should be adopted, passed, made or issued in order to protect the environment, should be able to make a sworn declaration and apply to the Environmental Commissioner for a review of that particular need (see s.25(2) EBR).

In both cases, the Environmental Commissioner should supply a standardized affidavit form by which the applicants may provide their names and addresses, and explain why they believe that the review applied for should be undertaken in order to protect the environment. The application should also allow them to provide or summarize any scientific or technical evidence supporting their belief that the review applied for should be undertaken in order to protect the environment. This form should be devised in a way that clearly identifies the policy, Act, regulation or instrument in respect of which the review is sought (see s.25(3) EBR).

The Environmental Commissioner should, within 30 days, refer the application to the appropriate Minister(s) responsible for the matters raised in the application. That Minister in turn would acknowledge receipt of the application directly to the applicants within 30 days of receiving it from the Environmental Commissioner (see s.26 EBR).

A Minister who receives such an application should determine in a preliminary way whether the public interest warrants the review. There are in Ontario at the present time, thousands of policies, regulations and instruments. A review of every single one could not possibly be undertaken in a manageable period of time, even if resources were unlimited. The Task Force understands that Ministers will need to exercise a wide degree of discretion in determining whether the public interest warrants a review of the particular application that has been submitted (see s.27 EBR).

The Task Force recommends that, in determining whether the public interest warrants a review, the Minister should consider the public interest in not disturbing a decision made in the five years preceding the date of the application if the decision was made in accordance with the standard of public participation contemplated in the Environmental Bill of Rights generally (see s.28(2) EBR).

The Task Force recommends this five-year rebuttable presumption of environmental soundness as a way of increasing the certainty of the process. Once a proposed policy, regulation or instrument has had public comment through the Environmental Bill of Rights process or an equivalent process, those who must rely on the decision should be able to do so with some certainty.

However, there may be circumstances in which it is necessary to undertake a review of an existing policy, regulation or instrument and in determining whether the public interest warrants a review the Minister should consider:

(a) the Ministry Statement of Environmental Values;
(b) any social, economic or scientific evidence that the Minister considers relevant;
(c) the potential for harm to the environment if the review applied for is not undertaken; and
(d) any other matter that the Minister considers relevant.

The Task Force recommends that the Minister also consider, when making a decision with respect to existing policies, Acts, regulations or instruments:

(a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and
(b) how recently the policy, Act, regulation or instrument was made, passed, or issued (see s.28(4)).

Again, this type of determination is necessary in order to offer certainty to those who must rely upon decisions by government once made through a process of notice and comment as contemplated by the Environmental Bill of Rights.

In the event that a Minister decides not to undertake a review as a result of an application, he/she should inform the applicants and the Environmental Commissioner in writing. This should be done within 120 days of receiving the application from the Environmental Commissioner (see s.29 EBR).

The Task Force recommends that where the Ministry undertakes a review, whether it relates to an existing policy, Act, regulation or instrument or the need to create one, the Minister should give the applicants written notice of the results of the review within 30 days of its completion. This notice should include what steps, if any, the Minister has taken or proposes to take as a result of the review. In addition, a copy of the notice should be sent to the Environmental Commissioner (see s.30 EBR).

The Task Force contemplates the same type of role for the Environmental Commissioner with respect to Applications for Review as with respect to Applications for Investigations. That role is one of monitoring the number of Applications for Review, on a Ministry by Ministry basis, their disposition, and the exercise of Ministerial discretion with respect to the undertaking of reviews.

As the Environmental Commissioner develops a certain amount of expertise over time, it may be appropriate for that office to be consulted about the reviews being undertaken with respect to policies and regulations.

In the context of the Application for Review, the Task Force considered the need for a review of existing policies that are in the form of guidelines. In many of the Ministries that make significant environmental decisions, officials apply what are sometimes known as "guidelines". These guidelines are important and set the criteria by which instruments are issued by the various Ministries. They can be, in certain circumstances, very precise and technical. They offer important guidance to applicants about the points at which discretion is exercised by officials and the criteria used by officials in exercising their discretion.

Given the significance of these guidelines to the issuance of environmentally significant instruments, it is important that guidelines already in use be infused, over time, with the purposes of the Environmental Bill of Rights by means of the individual Ministry Statements of Environmental Values. In some circumstances, it will be appropriate for Ministry guidelines used for the issuance of instruments to be the subject of Application for Review and therefore consideration through the Environmental Registry. It is anticipated that this review will result in some guidelines being converted into regulations and therefore having increased certainty. In other cases the guidelines may be changed to reflect the Statement of Environmental Values of the particular Ministry, and in still other cases the guidelines may be rejected as out of date and in need of replacement by more contemporary guidelines. This means essentially that guidelines used by Ministries for the issuance of instruments may in certain circumstances require broad public consultation in order to ensure that they are, first, as up to date as possible, secondly, that they are infused with the Environmental Bill of Rights purposes by way of the Statements of Environmental Values and finally, that guidelines capable of being converted into regulations be converted for the sake of increased certainty for those who apply for them.

Over time, environmental guidelines in the various Ministries should become the important environmental standard by which instruments are issued. The long-term goal should be to ensure that these guidelines are environmentally sound and that they offer certainty, predictability and uniformity to those who must apply for instruments. Assuming this can be achieved, the five-year rebuttable presumption with respect to undertaking a review would ultimately only need to be disturbed where there was new scientific or technical evidence suggesting the need for a different standard for the issuance of the particular instrument and that it would be in the public interest to make such a change.

The Task Force anticipates that individual Ministries, as they join the Environmental Bill of Rights regime, may receive a number of Applications for Review of existing policies, regulations and instruments. If this occurs, the Task Force considers it reasonable for a Minister, who intends to place the proposals on the Environmental Registry, to prioritize the order in which the Minister wishes to undertake the reviews sought. The Task Force appreciates that everything cannot be done at once and that a Ministry should not be criticized because it does not immediately undertake a review of every significant existing policy, regulation or instrument. A Minister who provides an adequate plan showing a strategy for a review through the Environmental Registry of policies, regulations and instruments within his/her Ministry, should be given an opportunity to infuse, over time, those areas with the purposes of the Environmental Bill of Rights and the Ministry's Statement of Environmental Values.

In conclusion, the Task Force recommends that:

- ***there be a standardized method by which any two residents of Ontario who are eighteen years of age or older who believe that an existing policy, Act, regulation or instrument should be amended, replaced, repealed or revoked in order to protect the environment be able to apply to the Environmental Commissioner for a review of that policy, Act, regulation or instrument by the appropriate Minister.***
- ***any two residents of Ontario who are eighteen years of age or older and who believe that a new policy, Act, regulation or instrument be adopted, passed, made or issued in order to protect the environment, be able to apply to the Environmental Commissioner for a review of the need for a new policy, Act, regulation or instrument by the appropriate Minister.***
- ***the Environmental Commissioner supply a standardized form that enables the applicants to provide the following information:***
  (a) their names and addresses,
  (b) an explanation of why the applicants believe the review applied for should be undertaken in order to protect the environment; and

  (c) *a summary of any scientific evidence supporting the applicants' belief that the review applied for should be undertaken in order to protect the environment.*

- *The form provided by the Environmental Commissioner also clearly identify the policy, Act, regulation or instrument in respect of which the review is sought (see s.25(4) EBR).*
- *The Environmental Commissioner, within 30 days, refer the application for review to the Minister(s) responsible for the matters raised in the application.*
- *The Minister who receives an application for review from the Environmental Commissioner acknowledge receipt of the application directly to the applicants within 30 days of receiving the application from the Environmental Commissioner.*
- *The Minister should consider applications in a preliminary way to determine whether the public interest warrants the review.*
- *In determining whether the public interest warrants a review, the Minister consider the public interest in not disturbing a decision made in the five years preceding the date of the application if the decision was made in accordance with the Environmental Bill of Rights or a substantially equivalent process.*
- *In determining whether the public interest warrants a review the Minister should consider:*
  - (a) *The Ministry Statement of Environmental Values;*
  - (b) *any social, economic or scientific evidence that the Minister considers relevant;*
  - (c) *the potential for harm to the environment if the review applied for is not undertaken; and*
  - (d) *any other matter that the Minister considers relevant (see s. 28(3) EBR).*
- *When considering the public interest with respect to the review of an existing policy, Act, regulation or instrument, the Minister also consider:*
  - (a) *the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and*
  - (b) *how recently the policy, Act, regulation or instrument was made, passed, or issued.*
- *The Minister inform the applicants in writing within 120 days of receiving the application if he/she does not intend to conduct the review.*
- *Within 30 days of completing a review, the Minister give the applicants written notice of the outcome of the review. This notice should include a statement of what steps, if any, the Minister has taken or proposes to take as a result of the review.*
- *The notice of completion of the review be sent to the Environmental Commissioner.*

- ***The Environmental Commissioner exercise the same functions and duties with respect to applications for review as with respect to applications for investigation of contraventions. These duties should include monitoring the number of applications for review, their disposition and the exercise of ministerial discretion with respect to the undertaking of a review.***
- ***Ministers who receive numerous applications for review be able to prioritize their review of any existing policies, regulations and instruments.***
- ***If requested by the public, existing guidelines used to issue significant environmental instruments could be placed on the Environmental Registry for an opportunity to obtain public comment an to determine the form and content of such guidelines. Guidelines that can be in the form of regulations should be converted into regulations wherever reasonable.***

C. ACCESS TO THE COURTS FOR PROTECTION OF THE ENVIRONMENT

As described in previous sections, the approach the Task Force used in designing an Environmental Bill of Rights was to begin with a recognition of government's primary responsibility for protection of the environment, and to then design reasonable and affordable methods of empowering the public to help government to meet its responsibility. We have described in the preceding sections of this report, a method of public participation in significant environmental decisions by government and the role and function of an Environmental Commissioner. The system's transparency is designed to provide accountability for environmental decision-making within government. The goal is to ensure that significant environmental decisions are made in an open, public way, with adequate notice to the public, with timely opportunity to comment, and with written decisions. Such a system, if implemented, would lead to uniform decision-making that is predictable and certain and meets the purpose of the Environmental Bill of Rights. With oversight of the decision-making process by an Environmental Commissioner, the system's accountability should be significantly increased.

The public participation system recommended by the Task Force does not prohibit the making of "poor" environmental decisions. It does, however, make such decisions politically unwise. Is political accountability enough? The Task Force is of the opinion that in some circumstances political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of government's failure to protect the environment.

The Terms of Reference of the Task Force state that an Environmental Bill of Rights will recognize and be based on the following policy objectives and principles:

- the enforcement of the public's right to a healthy environment through improved access to Ontario's courts and tribunals, and that,
- this right to enforcement would include an enhanced right to sue those who cause harm to our environment.

The Terms of Reference went on to identify five tools that, if incorporated into the Environmental Bill of Rights, might achieve the above objectives:

i) the creation of a duty to protect public resources,
ii) an expanded civil cause of action for environmental harm,
iii) an expanded right of standing for environmental claims,
iv) expanded provisions for judicial review of government action, and
v) exemption of certain types of environmental harm from any ultimate limitation period proposed in the Ministry of the Attorney General's Consultation Draft of the *General Limitations Act*.

Traditionally, society's approach to environmental protection has been rooted in the protection of private interests. Our current understanding of the regional and international dimensions of environmental problems has led to consideration of environmental issues as a community issue, and to ways in which the community can act to protect the environment.

With this in mind, the Task Force considered each of the potential tools in the context of identifying and remedying existing shortcomings in Ontario's environmental law. In order to understand the approach formulated by the Task Force it is important to briefly consider the choices the Task Force faced.

Creation of a Duty to Protect Public Resources

Bill 23, An Act Respecting Environmental Rights in Ontario (formerly Private Member Bill 12), which was introduced to the Ontario Legislature as a Private Member's Bill in 1989, attempted to create a statutory recognition of the Province of Ontario as trustee of Ontario's public lands, waters and natural resources. The Bill sought to require the Province, as trustee, to conserve and maintain its public lands, waters and public resources for the benefit of present and future generations. The Bill went on to declare that it would be in the public interest to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination or degradation. This approach, which has been discussed and debated for many years, is known as the "public trust doctrine" and was seen as the starting point for a power of individual residents to use our courts to call the government to account, if it violated that trust.

An Expanded Civil Cause of Action for Environmental Harm

The law of Ontario currently recognizes a variety of causes of action that act as common law rules governing access to our courts. Causes of action are substantive rather than procedural components of our justice system. Ones that are well known to the public include such things as negligence, breach of contract, nuisance, and a variety of others. It has been said that the traditional causes of action have not kept pace with modern society and that new causes of action should be created that will provide access to the court system for the protection of the environment.

This led to a proposal for the creation of a statutory cause of action that would enable residents to protect the environment by commencing proceedings in court against the person responsible for environmental harm.

Right of Standing for Environmental Claims

The law of standing is an area of law that concerns who should be entitled to stand before the court to complain about a particular issue. It goes directly to the philosophical question of who shall have access to Ontario's courts. In some cases, standing is linked with the cause of action. Traditionally, those who have suffered a particular type of loss, whether it be a financial loss, personal injury or damage to property, have been considered eligible to use our court system provided they could tie their individual loss to a recognized cause of action. For example, if an individual was harmed because someone was negligent, then the person who had been harmed would be entitled to stand before the court and allege that another individual had been negligent and, if found to be true, the court could order compensation for the harm from the person who caused it. Historically, our justice system has not contemplated persons being entitled to stand before the court and complain about issues on the grounds of principle rather than actual loss. However, in recent years, the courts have seen an expanded role for persons who wished to complain or use our courts to have matters of principle determined. Constitutional issues may now involve matters being placed before the court by persons who have suffered no actual loss but who have standing as a citizen of Canada to draw the issue to the court's attention. With respect to the environment, an enhanced right of standing would be directed to expanding the entitlement of residents to stand before the court to complain about harm to their environment, whether that harm has affected them directly or not. The Ontario Law Reform Commission has considered this question and provided the Attorney General with recommendations for reform of the law of standing generally.

The Ontario Law Reform Commission, in its Report on the Law of Standing, identified deficiencies in the present law. It was of the opinion that the current law of standing is antiquated, inconsistent and in serious need of reform. Deficiencies include the operation of the "public nuisance rule", which in some cases severely restricts the rights of individuals to stand before the court to raise issues of public interest, the fact that different standing rules operate in different contexts, and finally, the overall complexity and ambiguity of this area of the law.

The Ontario Law Reform Commission not only identified the shortcomings of the current law of standing but also made extensive recommendations about reform. In December of 1990 the Honourable Howard Hampton, Attorney General, established the Advisory Committee on the Law of Standing to consider the recommendations of the Ontario Law Reform Commission. Its fourteen members represented a broad cross-section of interests in this area of law, academe, business, environmentalists, consumers, and many others. The Attorney General also recognized the importance of the law of standing to environmental claims. In particular it was understood to be a potential companion reform to an Environmental Bill of Rights. It is important to understand the relationship between the mandate of the Task Force on the Ontario Environmental Bill of Rights and the Attorney General's Advisory Committee on the Law of Standing.

The Attorney General's Advisory Committee on the Law of Standing was asked to consider, among other things, the larger question of the reform of the law of standing for all claims and causes of action capable of entering the justice system in Ontario. The Task Force on the Ontario Environmental Bill of Rights was necessarily concerned only with expanded standing for environmental claims.

Expanded Provisions for Judicial Review of Government Action

Judicial review is a procedure by which residents may ask a court to review a decision by government, made through the exercise or non-exercise of a power or duty imposed by an Act on a Minister of the Crown or his/her officials. Judicial review is currently available to obtain review of some government decisions on certain limited grounds. It has been suggested that the availability of judicial review be expanded in the area of environmental decision-making by government to provide increased accountability.

Exemption of Certain Types of Environmental Harm from the Proposed Ultimate Limitation Periods

Limitation periods are designed to bring some finality to potential court claims by extinguishing claims that people are entitled to bring to the court after the expiry of various time limits (eg, 6 years). They are designed to ensure that there is certainty and an end to liability, and to encourage persons who wish to complain about a loss or harm to bring those claims to court within a reasonable period of time. Unfortunately, the law of limitation periods in Ontario is, at the present time, seriously out of date. The Ministry of the Attorney General has undertaken a review of limitation periods in Ontario and is bringing forward a draft bill for consideration by the Ontario Legislature, possibly before the end of 1992. One of the proposals contained in the draft bill is that an ultimate limitation period be imposed for all causes of action (with a few exceptions). This would mean that regardless of the time or way in which a claim arose it would be extinguished once and for all after a thirty year period running from the "discovery" of the claim. This provision is not unprecedented and is available in other jurisdictions. The question for the Task Force was, should such ultimate limitation periods be applied to environmental claims whose magnitude frequently is not appreciated for many years? While an ultimate limitation period increases certainty, to apply one to environmental claims, it was said, might decrease access to the courts for rectifying environmental harm.

Complementary Reform: Class Proceedings and Intervenor Funding

As the Task Force considered the above choices it was aware of two other reforms that, while not a part of the proposed Environmental Bill of Rights, will make a significant contribution to access to courts and tribunals in Ontario for environmental protection. These two reforms are:

(1) the *Class Proceedings Act* and related amendments; and

(2) Intervenor Funding.

Access to the Courts, Environmental Protection and Class Proceedings

Private Member's Bill 23 (formerly Bill 12), [illegible] previous versions of Private Members' Bills on the Environmental Bill of Rights, sought to introduce class actions to the law of Ontario for the purposes of environmental claims. For example, Part III of Bill 23 provided in ss.13(1) through (4) a means by which a claim under the Environmental Bill of Rights could be brought by one or more persons as representatives of the class provided the class or group of persons had a question in common that arose out of a claim for environmental harm.

Briefly, a class proceeding (or class action as it is known in the United States), is an action brought on behalf of or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of many.

A class action is designed as a procedural method of economizing on judicial and legal resources and of bringing, in some cases, a number of otherwise uneconomical individual claims into the court system for redress. It is important to understand that the class action procedure does not create new causes of action or "new things to sue for", but, rather, creates a new procedural method of permitting one person to sue in a representative capacity.

Aside from increasing access to the justice system, economizing on judicial and legal resources, and allowing otherwise uneconomical claims to achieve redress, a class action procedure has also been seen as a method of deterring illegal or unlawful behaviour by ensuring that those who carry on activities which may cause widespread harm may be called to account.

The current Rule 12 of the Ontario Rules of Civil Procedure provides a method of allowing numerous persons having the same interests to bring or defend a proceeding on behalf of a group when authorized to do so by the court. This Rule was given a restrictive interpretation by the courts (see General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72) and class litigation was confined to very narrow circumstances. The Naken case demonstrated that over time four types of barriers to class actions have existed in Ontario: substantive, procedural, evidentiary and financial.

The Ontario Law Reform Commission undertook a comprehensive study of the treatment of class actions around the world and published a three-volume report in 1982 that recommended extensive class action reform. In addition, in 1978, Quebec passed into law provisions that made class actions available for their residents. Class actions have been available in the United States for decades at both the federal and state court level.

On June 29, 1989, the Attorney General announced in the Legislature the government's intention to undertake class action reform and the formation of the Attorney General's Advisory Committee on Class Action Reform. It, like the Task Force on the Ontario Environmental Bill of Rights, was made up of key stakeholders. The Class Action Advisory Committee included representatives of business interests, consumers, lawyers, environmentalists, and insurers.

At the time this Advisory Committee was formed it was thought that if class action reform was worthwhile it should not be confined to environmental claims alone. The Advisory Committee was therefore given Terms of Reference that authorized it to attempt to develop a consensus on a comprehensive, generic class action procedure. Appendix II contains a copy of the Press Release from the Ministry of the Attorney General that describes the Terms of Reference and background to this Advisory Committee.

The Advisory Committee was able to reach a unanimous consensus on the shape of class action reform in Ontario. The recommendations of the Advisory Committee were translated into legislative form in Bill 28, the *Class Proceedings Act*, and Bill 29, the *Law Society Amendment Act*. The popular term "class action" has been replaced by the expression, class proceedings, because the Ontario Rules of Civil Procedure contemplate both an action and a notice of application, together known as "proceedings". The two Bills received Third Reading by the Ontario Legislature on Monday, May 4, 1992. When proclaimed these Acts will apply to environmental claims brought forward in a class action form. The key features of the class proceedings procedure are described in Appendix II.

For a detailed view of the approach of the Attorney General's Advisory Committee on Class Action Reform, one should read the report of the Advisory Committee, which is available from the Ministry of the Attorney General of Ontario, as well as the *Class Proceedings Act* and the *Law Society Amendment Act*. The reform is seen as a significant step forward on behalf of litigants in Ontario and in particular for those who litigate environmental claims. Most importantly it should be understood in considering the recommendations of the Task Force on the Ontario Environmental Bill of Rights that the Task Force members, four of whom were also on the Attorney General's Advisory Committee on Class Action Reform, see the class proceedings reform as an integral part of an Environmental Bill of Rights. Although not legislatively contained in the same legislation, they undoubtedly will work together.

Access to Tribunals and Intervenor Funding

Intervenor funding plays an important role in ensuring that members of the public and interested groups have the necessary financial resources to participate in some of the extensive hearings held before Ontario's tribunals.

The *Intervenor Funding Project Act* was proclaimed on April 1, 1989 as a three-year pilot project. Under this Act, organizations likely to benefit financially from a decision by the Environmental Assessment Board or the Ontario Energy Board provide funding to public interest intervenors at hearings.

The *Intervenor Funding Project Act* has been valuable in ensuring that environmental concerns are fairly represented at, for example, Environmental Assessment Board hearings. It requires project proponents instead of the provincial government to provide funds needed by public interest intervenors. Over the past three years, the Act has provided groups with the financial means to present their cases to boards reviewing such proposals as municipal landfills, electric power generation and changes in gas utility rates.

On March 25, 1992, Attorney General Howard Hampton, Environment Minister Ruth Grier and Energy Minister (Acting) Brian Charlton announced that the pilot project has been continued for four more years. The decision to continue the legislation was made after completion of an independent evaluation of the Act. This evaluation, a joint effort by the Ministry of the Attorney General, the Ministry of the Environment and the Ministry of Energy, was carried out by a consulting team headed by Professors W.A. Bogart and Marcia Valiante, both of the Faculty of Law of the University of Windsor.

As in the case of class proceedings reform, intervenor funding is not explicitly a part of the proposed Ontario Environmental Bill of Rights. However, there is a connection between the renewal of this project and increased public access to Ontario's tribunals that make environmental decisions. The Task Force members note that their recommendations as contained in the Ontario Environmental Bill of Rights will be read in the context of the availability of intervenor funding through the four-year renewal of the Intervenor Funding Project.

The Task Force recommends that during the period of public comment that follows release of this report public education about the proposed Environmental Bill of Rights should include references to the Class Proceedings Reform and the extension of the Intervenor Funding Project.

An Approach to Increased Access to the Courts Through An Environmental Bill of Rights

1. Cause of Action for Public Nuisance and the Law of Standing

As discussed above, in some cases the law of standing, that is who is entitled to stand before the court and complain, and the causes of action themselves, are linked. The law of public nuisance is a good example. Public nuisance has been defined as "an inconvenience or interference caused to the public generally, or part of the public, which does not affect the interests of individuals in land".

Historically, only the Attorney General was entitled to bring a public nuisance action, either on his own or through a private person, known as a relator, to whom permission to bring the lawsuit had been granted. In order for private individuals to sue for public nuisance they had to meet one of two conditions. First, they could bring the cause of action to the court if the Attorney General consented to the action. Secondly, without the Attorney General's consent they could bring the cause of action for public nuisance before the court if they could demonstrate that they had suffered a harm, or possessed an interest, that was different from and greater than that of the rest of the public. In other words, it was necessary to demonstrate a higher level and a different kind of harm than that suffered by the public at large or by others affected by the activity.

The court's interpretation of the public nuisance rule created the unusual outcome that numerous individual members of a community could suffer inconvenience or interference and be denied access to the courts to complain about it, simply because they had all suffered the same level or kind of inconvenience or interference. It also seemed anachronistic to the Ontario Law Reform Commission that a politician, the Attorney General, should be required to give permission in order for residents who had suffered such a loss to use Ontario's courts. The Ontario Law Reform Commission, in its report on the Law of Standing, described the rule of public nuisance as offensive and incompatible with notions of who ought to have access to the judicial process in the face of widespread harm caused to all, or a significant segment of the community (page 2, Ontario Law Reform Commission Report on Standing). Similarly, it seemed inappropriate that many persons could be denied access to the courts simply because they had all been affected by the public nuisance in the same way.

The Supreme Court of Canada has already determined that the public nuisance rule should not apply to constitutional challenges to legislation or to challenges to certain forms of administrative action. Instead, a broad discretionary approach was developed by the courts when determining who is entitled to complain to the court in such circumstances. However this interpretation of public nuisance did not extend to environmental claims. As a result the Attorney General's permission or the need to demonstrate special harm continued to be an obstacle to residents of Ontario who wished to use our courts to address environmental harm under the cause of action of public nuisance.

The Task Force considered this issue and felt that such a barrier could no longer be defended in a modern society that needs flexible tools to allow residents to obtain redress for harm to the environment caused by a public nuisance.

The Task Force recommends removing the barriers to the use of public nuisance for environmental harm. The Task Force considered the various court decisions that have led to interpretation difficulties in this area in an effort to understand how to best design a solution to the "public nuisance" issue. Discussion of the following cases was particularly helpful:

- Hickey v. Electric Reduction Co. (1970), 2 Nfld. & P.E.I.R. 246, 21 D.L.R. (3d) 368 (Nfld.S.C.)
- Stein and Tessler v. Gonzales et al [1984], 6 W.W.R. 428, (B.C.S.C.)

Consideration of the outcome of these decisions led the Task Force to conclude that reform of this area should be undertaken cautiously and in increments. For example, the difficulties examined by the Task Force with reference to public nuisance were confined to situations of public nuisance that were causing environmental harm. The Task Force makes no recommendation with respect to incidents of public nuisance relating to non-environmental concerns.

In addition the Task Force recommends that reform in the area of public nuisance be undertaken in increments. The proposed change with respect to public nuisance that causes environmental harm should be watched carefully for a period of three years to allow some analysis of the effectiveness of the reform in increasing access to the courts for environmental protection prior to undertaking any further reform.

The Task Force considered the types of losses caused by environmental harm and whether those losses could be effectively recovered in the context of a public nuisance action. Important to this analysis by the Task Force was consideration of whether the loss could not be recovered under some other equivalent cause of action. For example, if all types of losses were recoverable in negligence then there would be no need to expand access to public nuisance for environmental harm.

The Task Force concluded that it was necessary to expand the availability of public nuisance for environmental harm since every type of direct loss caused by environmental harm could not be recovered under some other cause of action such as negligence. For example, negligence depends on a duty being owed from one party to another, the breach of which leads to liability if harm or loss occurred. This duty is not present in every case of environmental harm caused by a public nuisance.

The Task Force also considered the issue of the nature of the loss which should be recoverable in a public nuisance claim for environmental harm. There will be no change in the law governing the connection between the incident of which the injured person complains, and the harm suffered. This aspect of the law concerns the directness of the injury that flows from the incident of environmental harm. The courts had traditionally required that an injured person prove that his/her loss is directly caused by a particular incident or series of incidents. If the loss cannot be directly connected to the act complained of then it is said to be "too remote" to merit recovery. The Task Force makes no recommendation with respect to this requirement of proof. The area of remoteness of damages has evolved in the courts and the Task Force recommends that the tests applied by the court or developed by the court with respect to directness continue to govern use of a reformed action for public nuisance for environmental harm. The Task Force is of the opinion that only direct loss should be recoverable in this type of action.

The types of direct losses that a person may suffer as a result of a public nuisance that causes environmental harm are of two kinds - losses that are of a pecuniary or economic nature and losses that are of a personal injury nature.

Pecuniary or economic loss can include such things as loss of income, loss of a business, loss of property or its use, or even the loss of a livelihood. In the past the courts have developed guidelines for these types of losses and the Task Force makes no recommendation for a change beyond observing that the type of loss suffered in the Hickey case should be recoverable under the heading of public nuisance for environmental harm as a direct economic loss. Recovery for economic loss should, in the Task Force's opinion, include any economic loss that flows directly from the environmental harm caused by the public nuisance. In all other respects the types of economic loss recoverable in the courts should remain as they are currently.

The other type of loss that is recoverable in such actions is personal loss that is non-pecuniary. This typically includes pain and suffering claims related to actual physical injury. The Task Force is of the opinion that any such loss that arises directly from a public nuisance that is causing environmental harm should be recoverable. If a plaintiff can establish a direct connection between his/her injury and the activity of which he/she is complaining (ie, it is not too remote), then the loss should be recoverable under the heading of public nuisance.

The Task Force recommends that:

- ***no person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment should be barred from bringing an action in respect of the loss only because the person has suffered or may suffer a direct economic loss or direct personal injury of the same kind or to the same degree as other persons;***
- ***the reform, once implemented, be monitored closely to evaluate its effect on access to justice for environmental claims. Further reform of the law of standing and public nuisance should await the outcome of that analysis;***
- ***the Attorney General's permission no longer be required for public nuisance claims arising from environmental harm to enter the justice system.***

2. Enhanced Protection of Public Resources: A New Cause of Action

The Government of Ontario is, in a sense, the "owner" of the Province's public resources, including Crown lands, water on Crown lands, groundwater, and the air.

The government and even members of the public through a private prosecution, currently have the ability to commence quasi-criminal prosecutions of those who cause harm to public resources. However only the government can institute civil claims before the courts for damages (see for example, s.99(2) of *Environmental Protection Act*, RSO 1990), to obtain redress from those who have harmed a public resource. The fact that the government has undertaken a quasi-criminal prosecution for environmental harm to a public resource should not bar civil claims in connection with the same harm. This is because the primary purpose of prosecutions is deterrence through punishment of the offender while the civil cause of action is designed to achieve compensation for the harm caused. The government can also use administrative sanctions to protect the environment and public resources.

The Task Force is of the opinion that since the government has the primary responsibility to set and enforce environmental standards to protect the environment from harm in accordance with the Environmental Bill of Rights, it should use its powers to protect, in particular, Ontario's public resources. Although the government has some tools available for this, the Task Force was concerned that individual residents under the current law would have no entitlement to engage the justice system for protection of a public resource where government fails to meet its responsibility.

Applications for Investigation and the New Cause of Action

With this in mind the Task Force proposes the following method of providing a role for residents in protecting public resources. First and foremost, the Task Force is of the opinion that residents who have reason to believe environmental harm to a public resource is occurring should use the new procedure and apply to the government to investigate any alleged incident of environmental harm (see above discussion of Application for Investigation in Chapter 3(B)(iii)). In addition, if a resident considers that environmental harm to a public resource is occurring in a circumstance where there is no environmental standard or guideline for the activity, the resident should also consider using the Application for Review and suggest the creation of a standard by government (see above discussion of Application for Review in Chapter 3(B)(iv)).

An Application for Investigation, however, is effective only if government responds. The Task Force therefore considered the situation in which the government ignores a resident's Application for Investigation with respect to a public resource or the response is not reasonable. The Task Force is of the opinion that in such a situation a resident who had a reasonable belief that a person was causing or about to cause significant harm to a public resource through non-compliance with existing law and who used the Application for Investigation to no avail, should be entitled to use our courts to protect the public resource.

The Task Force does not wish to displace informal routes for the resolution of issues concerning harm to public resources and encourages persons who suspect that harm to a public resource is occurring to explore alternative informal solutions directly with the person allegedly causing the harm, or the government. However, assuming such informal routes do not yield a satisfactory response, residents of Ontario should then make use of the Application for Investigation. Where the government does not respond appropriately, the resident should then have access to the court system to protect Ontario's public resources.

To create this type of access to the courts for residents of Ontario, a new statutory cause of action for environmental harm to a public resource should be created.

Protection of Public Resources: New Statutory Cause of Action

Briefly the Task Force envisages a resident of the Province of Ontario having access to the justice system in some very specific situations. If a resident of Ontario believes that a public resource is being significantly harmed as a result of non-compliance with a prescribed statute, regulation or instrument, he/she, having attempted to prod government to meet its responsibility through an Application for Investigation (see s.41 EBR), should be able to commence proceedings in our courts against the person causing the harm. In such an action, the resident should be entitled to obtain an injunction to stop the harm and an order for the creation of a Restoration Plan. The Task Force is of the opinion that such a statutory cause of action, one that requires the resident to make use of the courts only as a last resort, will provide a valuable method of holding government to its responsibility to protect the environment and, in particular, public resources.

A resident who wishes to be plaintiff in such an action would be able to seek two orders from the court:

(a) an injunction to stop the harm to the extent that it is unlawful; and

(b) an order that the parties negotiate a plan to restore the public resource and return to the court for approval of the plan within a fixed period of time (see s.49 EBR).

The action would be with respect to harm resulting from contraventions that occur after the Environmental Bill of Rights comes into force and would not be retroactive (see s.40 EBR).

The court would be able to make interim orders as may be needed with respect to restoration, orders available under the Rules of Civil Procedure, declaratory orders and, with the exception of damages, any such other order as the court considers appropriate. The court could also order costs (see s.49 EBR).

In designing this cause of action, the Task Force was of the opinion that the resident of Ontario who sought to be plaintiff in such an action should only be able to complain if the significant harm to the public resource was occurring through non-compliance with one of the prescribed provincial statutes, a regulation, or an instrument. In other words, the person allegedly committing the environmental harm must be doing so through non-compliance with a law, regulation or instrument. If a law, regulation or instrument does not control the activity complained of, the resident's only recourse is the Application for Investigation of the environmental harm, or the Application for Review suggesting to government that a new standard for the conduct be created.

If a new statutory cause of action is used the Task Force was of the opinion that it should be used in the courts of Ontario as much as possible like ordinary civil litigation. Some exceptions, however, are necessary and the Task Force has specifically identified some considerations in that regard.

The Task Force recommends that the Rules of Civil Procedure be relied upon to ensure that all necessary parties are before the court and that a multiplicity of proceedings does not occur. However, the Attorney General should always be given notice of such actions. The Attorney General could have a role similar to that of an intervenor but would be subject to court orders. The Task Force therefore recommends only that the Attorney General always be a participant in the litigation. Since the Environmental Bill of Rights would bind the Crown, the Crown may in some cases be a defendant if it is responsible for the environmental harm to the public resource (see s.43 EBR).

Any action for harm to a public resource commenced by a resident in these circumstances must be served on the Attorney General to first, alert the government to a claim involving public resources and secondly, to acknowledge the allegation that the government has failed to protect the public resource as evidenced through the lack of or inadequate response to the Application for Investigation by that resident. It should be noted too that the Environmental Commissioner will have received notice of the resident's Application for Investigation.

The plaintiff in such an action should be required to apply to the court after the close of pleadings to obtain direction from the court with respect to how and when notice should be given to the public about the action. The action is, in a sense, on behalf of all residents of Ontario so notice is important for a number of reasons. It should assist the process by providing an opportunity for interested parties to join. The Environmental Registry should be used (see s.44 EBR).

The Task Force contemplates that the court will wish to order the content of notice which will be given to the public on the Environmental Registry, as well as the need for additional notice through such things as newspaper advertisements, personal service, and so on.

The form of notice on the Environmental Registry should be prescribed by regulation to ensure uniformity.

Public Interest Stay

It should be open to the Attorney General or any party, once served, to seek a stay of the proceeding on the basis that continued maintenance of the action in the courts is not in the public interest. On the motion for a stay of the proceedings the court should have regard for a number of factors including environmental, social and economic considerations. The court should consider whether the issues raised are better resolved by another process. A quasi-criminal prosecution may be under way in connection with the activity alleged to be responsible for the harm to the public resource. The civil court may wish to await the outcome of that process before making a determination. This would be especially true where, for example, section 190 of the *Environmental Protection Act* (RSO 1990) was likely to be invoked in the event of a conviction in the criminal process to obtain an order that the defendant restore the natural environment within a specified time (see s.47 EBR).

The court on a motion for a stay should also consider whether the government has developed a plan to address the public interest issues raised by the proceeding. The Task Force expects that in some cases the government and defendant may already be developing a response to deal with the alleged harm or its causes. The court may wish to await their joint efforts before undertaking more litigation if the plan appears to be adequate to meet the public interest.

It is important for the Attorney General to participate in this proceeding to ensure that government takes responsibility for the defence of the integrity of its decision not to act in response to the resident's Application for Investigation.

In the action, the onus would be on the resident (plaintiff) to establish that, on the balance of probabilities, the defendant is harming the public resource or that such harm is imminent as a result of non-compliance with a prescribed Act, regulation or instrument. The Task Force contemplates a resident being entitled to use this procedure not just to redress harm that has occurred but to prevent harm to a public resource that is imminent as a result of the same type of non-compliance (see s.41 EBR).

If the court is of the opinion that harm has occurred to a public resource as a result of the defendant's non-compliance with a prescribed statute, regulation or instrument, it could order an injunction to enjoin the activity causing the harm. This injunction could be simply to ensure that the defendant operates within the limits of any licence, approval or other permissions that it currently has from government.

Emergency

It should be noted that the Task Force also contemplates situations in which a resident should not be required to await the outcome of an Application for Investigation prior to instituting proceedings to protect the public resource. In some cases where there is a clear and present danger or an emergency and the public resource would be harmed unless the resident acts, it would be appropriate for the resident to enter the court system immediately to seek an injunction and an order for negotiation of a plan to restore the public resource (see s.41(4) EBR).

Defences

The Task Force considered three general categories of defence that could be available to a defendant alleged to be harming a public resource through non-compliance with a prescribed Act, regulation or instrument (see s.42 EBR).

If the defendant is in compliance with the Act, regulation or instrument then that should offer, in the Task Force's opinion, a complete defence to the civil action (see s.42(2) EBR).

If the defendant is able to satisfy the court that it was complying with an interpretation of the instrument that the court considers to be a reasonable interpretation that too should be a defence (see s.42(3)). In some circumstances the instrument under which the defendant operates - a licence, an approval and so on - may be technical or vague. If the defendant's interpretation is a reasonable one and it has complied with the instrument under that interpretation, then it should not be held liable for environmental harm to a public resource.

Finally, in addition to the above and any other defence available at common law, a defendant should be able to offer as a defence that, while it was not in compliance with the prescribed Act, regulation or instrument, it was exercising due diligence in attempting to comply (see s.42(1) EBR).

Compliance in the Context of a Prosecution

During the Task Force's consideration of compliance as a possible defence to the new statutory cause of action, an additional issue arose concerning the role of compliance with an instrument in the prosecution of an environmental offence.

The *Environmental Protection Act* and the *Ontario Water Resources Act* both provide general prohibitions against certain types of activity. Breach of their provisions can lead to a prosecution. The provisions which create offences:

- prohibit pollution in excess of prescribed standards,
- prohibit contamination and degradation that has a socially unacceptable impact, and
- ensure compliance with the administrative framework of the legislation.

Section 14(1) of the *Environmental Protection Act* provides, for example, as follows:

> Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the environment that causes or is likely to cause an adverse effect.

Adverse effect is defined in section 1(1) to mean one or more of the following:

(a) impairment of the quality of the natural environment for any use that can be made of it,
(b) injury or damage to property or plant or animal life,
(c) harm or material discomfort to any person,
(d) an adverse effect upon the health of any person,
(e) impairment to the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,
(g) loss of enjoyment of normal use of property, and
(h) interference with the normal conduct of business.

The question that arose within the Task Force discussions concerned whether compliance with an Act, regulation or instrument should be a defence to a prosecution of such an offence under the *Environmental Protection Act*.

It is difficult to predict at this stage the difference in terms of content of instruments issued after the Environmental Bill of Rights has been in place. Our expectation is that decision-making will be more detailed, clearer and more predictable. The instruments themselves will likely reflect the increased level of public comment. Similarly, environmental policies and regulations should reflect the increased level of public participation.

The role of compliance with an Act, regulation or instrument as a defence to a prosecution of an environmental offence after proclamation of the Environmental Bill of Rights, may require further analysis. The Ministry of the Environment has indicated in the course of the Task Force's discussions that it is prepared to discuss this issue further. While the Task Force makes no recommendation on this subject, the form and content of instruments after the implementation of the Environmental Bill of Rights should also be watched closely to determine whether changes occur in the nature and degree of compliance.

Orders From the Court

If the court finds that a plaintiff is entitled to judgment it should have the power to:

- grant an injunction, including an interim injunction,
- order the parties to negotiate a plan to restore the public resource,
- make declaratory orders and other orders as may be appropriate,
- order costs (see s.49 EBR).

With respect to injunctions the court should, in the Task Force's opinion, follow the well developed practices (see Rule 40.03 of the Rules of Practice) with respect to plaintiff's undertakings to be responsible for damages caused by an inappropriate interim injunction. However the court should also be mindful of the fact that it has the power to dispense with the need for, or compliance with, such undertaking where there are special circumstances. The Task Force notes that such special circumstances may include the fact that a novel point or test case was involved. In this regard the Task Force considered the case of Attorney General of Ontario v. Harry (1982) 35 O.R. (2d) 240 (H.C)

Restoration Plan

If the court determines that harm to the public resource has occurred or is occurring and makes a finding of liability against the defendant, the court should then be able to make orders with respect to restoration of the public resource through a Restoration Plan. The concept of a negotiated Restoration Plan is an important component of access to the court.

The Task Force recommends that the focus of a judgment in such cases be the restoration of the resource rather than the calculation of damage awards that may or may not be applied to restoration.

The Task Force specifically recommends that damage awards not be available as a part of a court's judgment and that purely monetary restoration plans be available only in limited circumstances (ie, with the consent of the defendant and Attorney General only). No personal loss has occurred for the plaintiff and damages could be difficult to quantify.

The Restoration Plan for a public resource that has been harmed should, to the extent that to do so is reasonable, practical and ecologically sound, provide for:

(a) the prevention, diminution or elimination of the harm,

(b) the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource, and

(c) the restoration of all uses, including enjoyment, of the public resource affected by the contravention.

In some circumstances, for example if actual restoration is not possible or uncertain, the Restoration Plan could include terms that might at least indirectly help prevent harm in the future, such as:

- research into and development of technologies to prevent, decrease or eliminate harm to the environment,
- community, education and health programs, and
- the transfer of property by the defendant so that the property becomes a public resource.

In these last three cases, the Task Force recommends that they be ordered only with the consent of the defendant.

The Task Force also understands the likely need for ongoing monitoring of any plan ordered by the court. Restoration will not occur overnight but will likely take years in the case of very significant harm. Restoration Plans should, where appropriate, include monitoring mechanisms and offer the flexibility to "fine tune" the restoration as it progresses.

If adequate restoration has already occurred or if restoration has already been ordered, for example in the context of a prosecution, then the court should not order a Restoration Plan under this new cause of action. However, if the Restoration Plan is ordered, then these same considerations may be factors in the extent of the plan required to satisfy the court.

The Task Force considered the possibility of Restoration Plans that are, in whole or in part, monetary. If a plan provides for monetary payments by a defendant, the Task Force recommends that such payments be only on consent of the defendant and the Attorney General and that all such monies be applied to restoration of the public resource. The funds should be held by the Treasurer of Ontario for that purpose. The monetary award should not simply be placed in the Consolidated Revenue Fund and applied to other government needs.

The powers of the court with respect to Restoration Plans should include the power to make ancillary orders, to ensure notice is made as required during the action to obtain expert assistance and to control participation in the proceeding by non-parties.

If the parties agree on a Restoration Plan it should be approved by the court in order to protect the public interest. If it is not approved by the court or if the parties cannot agree on a plan then the court should have the power to develop its own Restoration Plan to meet the needs of the public resource in question. In some circumstances the parties may be able to reach a partial agreement. If so, then the court may be required to resolve only the remaining or outstanding issues.

The court should have the authority to order the appropriate parties to participate in a negotiation of a plan to restore the public resource and that the defendants facilitate the negotiation by developing a draft restoration plan.

Costs

A resident who undertakes such litigation will face certain financial risks. The Task Force does not recommend any changes with respect to costs in such litigation. The Rules of Civil Procedure, in particular Rule 56 with respect to security for costs would still apply. At the conclusion of the litigation an order for costs associated with the proceedings would be made in accordance with the normal costs rules (s.131 of the *Courts of Justice Act*, RSO 1990), which include that:

(a) costs are in the court's discretion;
(b) the unsuccessful litigant pays the successful litigant's costs, unless otherwise ordered by the court.

The Task Force recognizes that the courts now have the discretion to depart from the normal costs rules where the litigation raises special circumstances such as a novel point, or it was considered to be a test case. The Task Force does not wish to create any special inducement to plaintiffs to commence litigation of this sort, nor should there should be any special inducement to the court to exercise its discretion under the above headings. The Task Force, in designing this approach, noted the way in which the costs rule is articulated in section 31 of the *Class Proceedings Act*.

Binding Effect

As the cause of action for harm to a public resource is available to all residents of the province, it is necessary that a judgment in such an action have a binding effect on all residents of Ontario - past, present and future - with respect to the particular harm alleged to have occurred, in the action. The doctrines of *res judicata* and issue estoppel should apply to prevent attempted re-litigation of civil claims once the harm complained of has been dealt with by a court.

The normal appeal routes will be available after a finding of liability that the defendant harmed a public resource, but a stay of the judgment would only be available with leave of the court pending that appeal.

Limitation Periods

The Task Force considered the relationship between this new cause of action for harm to a public resource and the Attorney General's proposed limitation reform. The proposed *General Limitations Act* would create a two-year limitation period for most causes of action and the Task Force is of the opinion that if the limitation periods of Ontario are standardized then the two-year period should apply to this statutory cause of action. The two-year limitation period should commence the day of the discovery of the harm of the public resource. The Draft *General Limitations Act*, currently available for public review, contains language in sections 4 and 5 and the Task Force is of the opinion that this language would be an appropriate description of the commencement date of a limitation period for harm to a public resource. The period should run if sufficient information was available such that given the harm a reasonable person could have brought the action at an earlier date.

The Task Force is of the opinion that the "ultimate limitation period" as described in the Attorney General's Draft *General Limitations Act* should not apply to this cause of action. The protection of public resources and access to our justice system to obtain redress should not be inhibited by such a provision in the Draft *General Limitations Act*. In some situations an ultimate limitation period may only create an incentive to polluters to conceal the extent of their harm to the environment. The Task Force is of the opinion that the rejection of an ultimate limitation period for a cause of action for harm to a public resource is appropriate particularly since the remedies available are confined to an injunction and the establishment of a process to create a Restoration Plan. Damage awards per se are not available and the rejection of an ultimate limitation period should not work an undue hardship on potential defendants. Ultimate limitation periods are not a part of the law at this time and should not be a part of the law designed to protect Ontario's public resources.

In this latter respect the Task Force suggests that the Attorney General of Ontario consider integration of the new statutory cause of action into the proposed *General Limitations Act* in consultation with environmentalists and other interested groups.

The effect of the Attorney General's proposed limitations reform on claims related to protection of the environment through other causes of action is unclear. The reduction of limitation periods and the application of an ultimate limitation period to other environmental causes of action should be given serious consideration. The Task Force suggests that the Attorney General consult with environmentalists and other key stakeholders on this issue in the context of the proposed Draft General Limitations Reform.

Legal Education

The Task Force appreciates that the recommendations it has made with respect to public nuisance and the new cause of action will, if enacted, require study by the legal profession and the judiciary. Task Force members therefore recommend continuing legal education for the legal profession, the judiciary and the government, about the purpose and operation of this new cause of action and the amended public nuisance rule. This education should explain the purpose of the new cause of action and the best method of responsible use of it to protect public resources. It will also be necessary to educate the legal profession and judiciary about the relationship between class proceedings, public nuisance and the new cause of action.

The Expected Effect of the Recommended Reforms

The Task Force has, in this section, recommended two significant reforms concerning access to the courts for protection of the environment. The reform proposed with respect to public nuisance removes an impractical barrier to our court system. The requirement for a special level of damages before independently instituting a claim for compensation arising out of a public nuisance that causes environmental harm is unjustified. The use to which the residents of Ontario put this cause of action remains to be seen, but the Task Force expects the legal profession and judiciary to utilize this new tool as responsibly as they have used other causes of action in the past. Its use should be watched closely.

The Task Force's goal in creating the new cause of action for harm to a public resource was to develop a method by which the public could act to hold government to its responsibility to protect public resources. It is the Task Force's belief that the cause of action will work in two ways. In some situations harm to a public resource will occur and the government will either not respond or not respond reasonably to a resident's concern about that harm. In such cases, where the resident has applied for an investigation, and still been dissatisfied, he/she will still have the alternative of using our courts. Likely there will be situations in which residents will be forced to use our courts as a last resort to protect our public resources. However the Task Force is also of the opinion that the mere existence of this new entitlement to use the courts should give those who would harm public resources and the government reason to take notice if a resident comes forward with reasonable concerns about harm to a public resource. Officials who consider Applications for Investigations that concern public resources should be aware that their failure to respond or to respond reasonably may ultimately be scrutinized by our courts or the Environmental Commissioner.

The Environmental Commissioner and the New Cause of Action

Barring an emergency, a resident of Ontario will only be able to have access to the courts to protect public resources where he/she has first applied for an investigation of the alleged harm pursuant to the new formalized Application for Investigation. The Application must flow through the hands of the Environmental Commissioner who will have responsibility for directing it to the appropriate Ministry.

If the resident does not receive a reasonable response within the requisite time and an action is commenced to protect the public resources then the Task Force recommends that notice of the action should be given to the Environmental Commissioner at the same time that notice is placed on the Registry. Whether this is achieved by having the plaintiff serve the Environmental Commissioner or by some administrative requirement the Task Force leaves to those who implement the Environmental Bill of Rights.

It is not intended that notice be given to the Environmental Commissioner for the purpose of the Commission joining the action or becoming a party. On the contrary, the Environmental Commissioner should avoid becoming involved in this litigation under any circumstances. His/her duty is to monitor and report on government decision-making with respect to the environment, not take legal responsibility for it.

The Environmental Commissioner should include in his/her biennial report a commentary on the relationship between the various Ministry responses to Applications for Investigation and the commencement of actions to protect public resources, the reasonableness of Ministry responses, the use of "emergency actions" by residents, the usefulness of notice on the Registry and other forms of notice, the role of the Attorney General in such actions, the effectiveness of Restoration Plans, the effectiveness of injunctions, the outcome of the actions, the use of undertakings and costs, and so on.
The Environmental Commissioner should also make recommendations for improvement or changes to the new statutory cause of action, if necessary.

It is also important to understand that the Task Force's recommendations will not create a flood of litigation in our courts. Where a resident has applied for an investigation by government to respond to harm to a public resource and is prepared to take the financial risks of litigation, he/she should have access to the courts on behalf of all residents of the province to ensure that the conduct complained of is given scrutiny where the government fails to act.

In conclusion, the Task Force is of the opinion that the reforms recommended in this part of the report will encourage government to meet its responsibility to protect the environment and public resources. Failure to do so will now not only be subject to public scrutiny and political accountability but limited judicial scrutiny and accountability as well.

The Task Force recommends that:

- ***a new statutory cause of action for the protection of public resources from significant environmental harm be created,***

- *any resident of Ontario be able to commence such a proceeding where significant environmental harm to a public resource is occurring as a result of non-compliance with an Act, regulation or instrument prescribed in the Environmental Bill of Rights, or where such harm is imminent,*
- *a pre-condition to such an action by a resident be an Application for an Investigation of the alleged contravention by the resident and an unreasonable or untimely response by the government,*
- *there be an exception for emergency situations where significant harm or serious risk of harm to a public resource may occur,*
- *the cause of action not be retroactive and should apply only in respect of harm resulting from contraventions occurring after the Act comes into force,*
- *the onus of proof be on the plaintiff and be on a balance of probabilities,*
- *in addition to any other common law defences, a defendant have available the defences of compliance with the Act, regulation or instrument, due diligence and reasonable interpretation of the instrument in question,*
- *the Attorney General be served with the Statement of Claim, and have all the rights of a party in the action,*
- *notice of the action be ordered by the court and placed on the Environmental Registry,*
- *the procedure provide for notice to the public to enable the court to provide fair and adequate representation of the private and public interests at stake and their participation,*
- *the court have the power to stay or dismiss an action where to do so would be in the public interest having regard to environmental, economic and social concerns,*
- *when considering a stay or dismissal the courts consider whether the issues raised in the proceeding would be better resolved in another process or whether there is an adequate government plan to address the public interest issues,*
- *the court have the power to order an injunction, the negotiation of a plan to restore the public resource, declaratory relief, and costs,*
- *a restoration plan, in respect of harm to a public resource from a contravention, may provide for, to the extent that to do so is reasonable, practical and ecologically sound,*
  - *(a) the prevention, diminution or elimination of the harm,*
  - *(b) the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource, and*
  - *(c) the restoration of all uses, including enjoyment, of the public resource affected by the contravention.*

- *where a defendant concurs, the court order may include research into and development of technologies to prevent, decrease or eliminate harm to the environment; community, education or health programs; and the transfer of property by the defendant so that the property becomes a public resource,*
- *a restoration plan, where appropriate, contemplate monitoring of its progress, and the need to "fine tune" it over time,*
- *a restoration plan include a provision for the payment of money only where the Attorney General and defendant consent, and in such a case the money should be paid to the Treasurer of Ontario and used only for restoration of the public resource,*
- *the court have the power to make ancillary orders to facilitate creation of the negotiation process and plan,*
- *the court approve any negotiated restoration plan in order to protect the public interest,*
- *the court have the power to develop a restoration plan where the parties cannot agree to a plan,*
- *res judicata and issue estoppel should apply to this cause of action,*
- *the court have discretion with respect to costs and when exercising its discretion should consider special circumstances such as whether the action is a test case or raised a novel point,*
- *the delivery of a notice of appeal not stay the operation of an order unless the appeal court grants a stay, on terms, if necessary,*
- *the new cause of action be subject to a two-year limitation period,*
- *the new cause of action not be subject to an ultimate limitation period,*
- *the action be integrated, if possible, with the Attorney General's proposed General Limitations Act,*
- *the bench and bar and government officials receive education about the new cause of action and its operation,*
- *the Environmental Commissioner, as a part of his/her duties, monitor the new cause of action and, in particular, its relationship to the Application for Investigation.*

D. INCREASED SECURITY FOR WORKERS WHO REPORT ENVIRONMENTAL HARM IN THE WORKPLACE

The Task Force Terms of Reference stated that the Environmental Bill of Rights should provide greater protection for employees who "blow the whistle" on employers who are causing environmental harm. The Terms of Reference went on to identify the extension of existing statutory protection for "whistleblowers" to other environmental offenses as a potential tool that, if incorporated, might achieve this goal of greater protection.

The concept of protection for employees who "blow the whistle" is not a new one. The *Environmental Protection Act* (RSO 1990) currently provides that in certain circumstances "no employer shall dismiss, discipline, penalize, coerce or intimidate, or attempt to coerce or intimidate an employee". Section 174 provides as follows:

> (1) In this section, "Board" means the Ontario Labour Relations Board ("commission)
> (2) No employer shall,
> (a) dismiss an employee;
> (b) discipline an employee;
> (c) penalize an employee; or
> (d) coerce or intimidate or attempt to coerce or intimidate an employee, because the employee has complied with or may comply with,
> (e) the *Environmental Assessment Act*;
> (f) the *Environmental Protection Act*;
> (g) the *Fisheries Act* (Canada);
> (h) the *Ontario Water Resources Act*; or
> (i) the *Pesticides Act*,
>
> or a regulation under one of those Acts or an order, term or condition, certificate of approval, licence, permit or direction under one of those Acts or because the employee has sought or may seek the enforcement of one of those Acts or a regulation under one of those Acts or has given or may give information to the Ministry or a provincial officer or has been or may be called upon to testify in a proceeding related to one of those Acts or a regulation under one of those Acts.

Where a person wishes to complain about an employer's contravention of this provision of the *Environmental Protection Act*, he/she may take the complaint to the Ontario Labour Relations Board. Briefly, the procedure requires that the written complaint be filed with the Board. Once the complaint is filed, the Board may authorize a labour relations officer to inquire into the complaint, or the Board itself may inquire into the complaint.

The labour relations officer who is authorized to inquire into the complaint, is required to do so as quickly as possible and to endeavour to effect a settlement of the matter complained of and report the results to the Board. If the labour relations officer is unable to achieve a settlement then, again, the Board itself may inquire into the complaint. Where the Board inquires into the complaint and is satisfied that the employer has contravened the above-noted section, the Board then determines what, if anything, the employer is required to do or refrain from doing with respect to the complaint.

The Board can order the employer to cease doing the act or acts complained of, direct the employer to rectify the act complained of, or direct the employer to reinstate the employee with or without compensation, or to simply compensate the complainant, in lieu of hiring or reinstatement for loss of his/her earnings. It is open to the Board to assess the amount that the employer should pay.

Throughout this proceeding, the burden of proof is on the employer to prove that he/she did not contravene the section prohibiting dismissal, discipline, penalties, coercion or intimidation of an employee who has "blown the whistle". Additional provisions ensure that an employer complies with any order made by the Board.

In December of 1989, the Ministry of the Environment reported on the outcome of a "whistleblowing" incident that had occurred in Belleville, Ontario, in March of 1989.

In that case, an individual who was at the time employed as an environmental technician with Bakelite Thermostats, had been instructed by the company, along with three other employees, to conceal and destroy documents relating to environmental matters. Instead of destroying them the employee took the documents home and gave them to investigators from the Ministry of the Environment.

This action led to the conviction of the company on three counts under the *Ontario Water Resources Act* and the *Environmental Protection Act*. These offences related to burning of naphthalene wastes in an unsuitable incinerator, permitting the discharge of phenolic wastes into the Bay of Quinte and failing to keep records of PCB wastes stored on the company's premises. The company was fined $100,000. The employee was later dismissed by the company on the grounds of "alleged absenteeism and unsatisfactory performance".

The matter of his dismissal was considered by the Ontario Labour Relations Board as a result of the *Environmental Protection Act* "whistleblower" protection provisions. The Board agreed with the individual that the company had punished him for his conduct in reporting environmental harm. The company was ordered to pay $4,000 in compensation, making him the first person to receive compensation under the *Environmental Protection Act* provision from the Ontario Labour Relations Board. The compensation might have been even higher had the employee not obtained another job within weeks of being dismissed by Bakelite.

In summary, an employee who needs to use the Ontario Labour Relations Board for handling of their treatment after "blowing the whistle" can be assured that the *Labour Relations Act* and the regulations under it apply with the necessary modification to any complaint made.

There has not been a great deal of experience with this section in Ontario but the above case and other commentary led the Task Force to the conclusion that the protection contained in the *Environmental Protection Act* and the Ontario Labour Relations Board process should be extended to all of the prescribed Acts referred to in the Environmental Bill of Rights. In addition to this expanded coverage of the whistleblower protection, some modifications are required to accommodate some of the other new features contained in the Environmental Bill of Rights. For this reason the Task Force recommends that, once placed in the Environmental Bill of Rights, the whistleblower protection should offer employees protection from dismissal, discipline, penalties, coercion, intimidation or harassment or attempts to commit those acts where the employee is,

(a) making an application for an investigation or review to government, or participating in the making of a policy or regulation or the issuance of an instrument as provided in the public participation portion of the bill,
(b) complying with an Act, regulation or instrument as prescribed by the Environmental Bill of Rights,
(c) complying with the *Fisheries Act* (Canada),
(d) providing the appropriate authorities with information to be used in an investigation, a review or hearing under the Environmental Bill of Rights or a prescribed Act, or
(e) testifying in a trial or hearing under the Environmental Bill of Rights or a prescribed Act.

This protection should be available where the employee is acting in good faith and has reasonable grounds to believe that such action will protect the environment from harm.

It is important to note that an employee who was dismissed in these circumstances would also have the opportunity to commence a civil proceeding in the courts of Ontario based on the law of wrongful dismissal. The area of law is highly developed in Ontario and if the employee was successful, the court's judgment would offer the employee damages calculated on the basis of lost wages and other expenses incurred, for which he/she had not already been compensated by the employer.

The Task Force Terms of Reference made reference only to expanded whistleblower protection but during the course of its own discussions and as a result of direct representations from the Ontario Federation of Labour, two other important issues surfaced - the right to refuse work that will harm the environment, and the concept of joint committees in the workplace to allow employer-employee co-operation and education about environmental harm.

The Right to Refuse Work

The *Occupational Health and Safety Act* of Ontario contains a provision that allows an employee to refuse work that is unsafe. Subsection 43(3) provides as follows:

> (3) A worker may refuse to work or do particular work where he or she has reason to believe that,
>
> (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
>
> (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or
>
> (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

Section 43(1) provides circumstances in which this right to refuse does not apply. For example, a person employed in a police force or a person employed as a fire fighter does not obtain the benefit of this right to refuse to do work that may endanger him/herself. Other exemptions are provided and for a full description regard should be had to subsection 43(1), subparagraphs (a) through (d).

Assuming the worker has the right to refuse to do work or to do particular work, the worker has an obligation to report promptly the circumstances of the refusal to the worker's employer or supervisor. That individual, in turn, must forthwith investigate the report in the presence of the worker and, if applicable, in the presence of either a committee member who represents workers, a health and safety representative, or a worker who, because of knowledge, experience and training is selected by a trade union that represents the worker. If there is no trade union then the workers may select an individual to represent them. Regardless of which of the above individuals is sought out, they must be made available and attend without delay. Another significant feature is the ability of the employer to ask another employee to perform the refused task in the interim.

The remaining subsections of section 43 provide a protocol for dealing with the investigation once the report has been made by the worker to the employer. The protocol includes provisions for such things as the worker's safety pending the investigation, the method of an investigation by an inspector, the manner of reporting by the inspector once the inspection is complete, and the duty to advise others of the potential danger pending the investigation.

Section 9 of the *Occupational Health and Safety Act* provides for joint health and safety committees in certain types of work places. For example, they are required in a workplace in which twenty or more workers are regularly employed, or in a workplace that deals with biological, chemical or physical agents or combinations of such agents (see s.33 of the *Occupational Health and Safety Act*). The function of the committee is to, among other things, identify situations that may be a source of danger or a hazard to workers, to make recommendations to the employer and the workers for the improvement of health and safety of workers, to obtain information from the employer respecting the identification of potential hazards of materials or processes in the work places, and finally to be consulted about testing of new equipment, machines, devices or materials in the workplace.

The joint health and safety committee can provide an opportunity for cooperation between employers and employees to ensure their collective safety in the workplace. When a health and safety work refusal takes place, the Act provides a definite role for the Committee in addressing the reasons for the refusal.

It was suggested to the Task Force that a parallel system could be created to enable employees to refuse to do work that might cause harm to the environment. It was also suggested that employees given this right, could act to discourage environmental harm by their employers. The Task Force also heard presentations regarding the need for and utility of joint environmental safety committees, and if such committees could be justified, differing views were expressed on whether or not these functions could be carried out by existing Joint Health & Safety Committees without the need for additional workplace representatives. While potential dangers to an employee's health and safety may have parallels to potential harm to the environment, there also appear to be some clear dissimilarities.

Under the Ontario *Occupational Health & Safety Act*, an employee is permitted to refuse to work because he/she sees a clear and imminent danger to him/herself or fellow workers. It is a decision made with respect to personal safety and is therefore the individual's right to refuse. In many cases, the risk is obvious, easily perceived, and well understood by an average person. No particular engineering knowledge is required to understand the design and manufacturing criteria or standards of the machine or device that is in question to conclude that its continued operation is unsafe. In addition, in some cases, the machine may be a "stand-alone" piece of equipment which can be stopped during the safety investigation with minimal impact on the overall and ongoing production in the plant. Even with health and safety work refusals, this may not always be the case. If the machine is an integral part of an assembly line process or critical to the overall operation of the plant then major economic costs could result from a health and safety work refusal.

The rationale for health and safety work refusals contrasts sharply with that related to giving employees the right to refuse work that may harm the environment. In an environmental context, this right is not necessarily a personal one, related to the employee's actual safety. Rather, it would be more in the nature of a right to refuse work where the outcome of a process harms the environment. However, environmental processes and machines are complex, and it may not be clear to an employee whether the machine or process is harming the environment. The worker, in most cases, may lack the engineering and scientific training to know if harm is actually occurring. Also the harm, even if it is occurring, may be relatively minor.

The Task Force considered the various viewpoints but was unable to make recommendations on the right to refuse or joint committee issue because time and resources were limited. For this reason, the Task Force suggests that the Ministry of Labour and Ministry of the Environment might consider the possibility of bringing the necessary expertise together to analyze this issue thoroughly. This expertise would likely include officials from the Ministry of Labour and the Ministry of the Environment, labour, business and other interested stakeholders.

"Whistleblowing" and the Ontario Public Service

It should be noted that the Task Force briefly considered the fact that a separate process for "whistleblowing" in environmental and other contexts is being developed for the Ontario Public Service. The whistleblowing recommendations made by the Task Force are designed to integrate with this proposed law.

"Whistleblowing" and the Environmental Commissioner

The Environmental Commissioner will have a variety of responsibilities in monitoring the implementation and performance of the Environmental Bill of Rights. These responsibilities should include the monitoring of reports by employees of environmental harm by employers and any "whistleblowing" related decision by the Ontario Labour Relations Board. An administrative arrangement should be developed to ensure that the Ontario Labour Relations Board provides notice to the Environmental Commissioner of complaints filed by employees arising from reports of environmental harm.

The Environmental Commissioner should provide comments on this aspect of the Environmental Bill of Rights in his/her biennial (once every two years) report to the Legislature.

In conclusion, the Task Force recommends that:

- ***The protection contained in section 174 of the Environmental Protection Act, RSO, 1990, be extended to the list of environmental Acts prescribed by the Environmental Bill of Rights.***
- ***The activities of employees that may be undertaken and protected from dismissal, discipline, penalty, coercion, and so on, include activities now proposed in the Environmental Bill of Rights such as requesting a review of government action or requesting an investigation.***

- ***The current relationship between the protection for employees who report environmental harm in the workplace and the Ontario Labour Relations Board be maintained with the Board having the same duties and powers.***
- ***The Ontario Labour Relations Board and the Environmental Commissioner develop an administrative practice through which the Board can notify the Environmental Commissioner of complaints to the Board concerning employee reports of environmental harm in the workplace for which there was dismissal or other punitive measures taken.***
- ***The Ministry of the Environment and the Ministry of Labour consider the possibility of bringing together labour, business, government, environmentalists and other interested parties to analyze the issues of a right to refuse work that may harm the environment and the need for joint employer/employee committees in the workplace.***

E. APPLICATION OF THE PROPOSED ENVIRONMENTAL BILL OF RIGHTS

(i) To the Ministry of the Environment

In the foregoing sections the Task Force has set out the conceptual framework and many of the details of the proposed system for public participation. In the following section the Task force provides an illustration of how this system would apply to the Ministry of the Environment.

This framework, which has been developed in some detail as it pertains to Ministry of the Environment prescribed Acts, policies, regulations and instruments, could be used by other ministries whose Acts will be prescribed by the proposed Environmental Bill of Rights and whose instruments will be captured by regulation under the proposed Environmental Bill of Rights over a transition period described in Chapter 5. The Task Force invites the public to consider whether this framework substantially achieves the goals of the Environmental Bill of Rights public participation regime.

Prescribed Acts for the Ministry of the Environment

The Task Force proposes that the Environmental Bill of Rights apply to the following Acts administered by the Ministry of the Environment:

- the *Environmental Protection Act*,
- the *Ontario Water Resources Act*,
- the *Pesticides Act*,
- the *Waste Management Act, 1992*,
- the *Environmental Assessment Act*, and
- the *Niagara Escarpment Protection and Development Act*.

Instruments which will be subject to the Environmental Registry System requirements will be those instruments issued pursuant to a prescribed Act, as designated by a regulation under the Environmental Bill of Rights. This section of the report contains a proposal to identify certain of these instruments under key Ministry of the Environment Acts and to classify those identified according to the graduated levels of public participation prescribed by the Bill. The public is invited to consider and comment upon the adequacy of this proposal. It is anticipated that once prescribed instruments issued under these specified acts are identified and classified, they will be designated in a regulation accompanying the Bill when it is passed into law. This would enable the Environmental Registry System components of the Bill to apply immediately to a prescribed group of Ministry of the Environment instruments, pending further definition and reclassification as described below.

Ministry Statement of Environmental Values

Each Ministry administering an Act prescribed by regulation under the Environmental Bill of Rights is required to develop a Statement of Environmental Values which integrates the purposes of the Environmental Bill of Rights with the traditional considerations applied by that Ministry in fulfilling its mandate. The public and the Environmental Commissioner will be consulted in the preparation of the Statement of Environmental Values. The Task Force anticipates that the Statement of Environmental Values will be infused in all significant environmental decisions made by that Ministry. As discussed earlier in this chapter, the Minister will be politically accountable for the application of the Statement of

Environmental Values to Ministry decision-making. Judicial review of the use of the Statement in Ministry decision-making is precluded.

As a first step, the Ministry of the Environment will be required to develop a Statement of Environmental Values. Other Ministries could use this Statement as a model to follow as they develop their own Statements.

Application to Ministry Of The Environment Policy Decisions

The Environmental Bill of Rights is designed to apply to a policy - meaning any major program, plan, objective or guideline - which:

- has a significant environmental impact or potential for such impact;
- is made in furtherance of the objectives of a prescribed Act; and
- is identified by the Minister as warranting public consultation.

Policies which are administrative, financial (including all grants and loans) or which arise from emergencies would not fall within this class of policy. Although the Environmental Bill of Rights applies only to those policies proposed after the Bill is law, the Task Force suggests the following types of present Ministry of the Environment policies are the type of policy which the proposed Environmental Bill of Rights should capture: the Compliance Policy; the Water Management Goals, Policies and Implementation Procedures; and various other policies such as the Guidelines for the Decommissioning and Clean-up of Sites in Ontario or the Guidelines for the Resolution of Groundwater Quality Interference Problems, contained in the Ministry of the Environment Policy Manual. Future amendments to such policies would be subject to the proposed Environmental Bill of Rights if the amendment would materially change the potential for environmental harm from the existing policy.

Where the Minister of the Environment proposes to make a significant environmental policy, she may have the proposed policy or a summary of it placed on the Environmental Registry System. The Registry will function in the manner described earlier in this chapter. Its key features are to provide broad notice of impending significant environmental decisions to the public in an accessible way and to provide a primary source of information respecting the content and status of these decisions. Further and more detailed information can be obtained from the Ministry directly, through a contact person identified on the Registry.

The policy component of the registry is used to provide notice to the public that a particular policy is being proposed and to invite interested members of the public to comment in writing on the substance of the proposed policy. Such comment could include the public's views on whether the proposed policy is consistent with the Ministry of the Environment's Statement of Environmental Values developed under the proposed Environmental Bill of Rights. The time for making comment shall be no less than thirty days, and can be longer at the option of the Minister.

In cases where public comment is received, the Minister shall give notice to the public of the implementation of the policy, including a brief explanation of the effect of public comment on the decision to implement the policy (see s.21(2)(3) EBR).

Although it is in the Minister's discretion to place a policy on the registry for public notice and comment, her failure to place an environmentally significant policy on the register may be the subject of comment by the Environmental Commissioner. In addition, the Commissioner may comment on whether a Minister's policy is viewed by the public or the Commissioner to be consistent with the Ministry of the Environment's Statement of Environmental Values.

In our democratic system of government, the final decision to make policy properly rests with the Minister as an elected official. However, Ministry of the Environment policies should be consistent with the purposes of the EBR as these purposes are integrated with other considerations to form the Ministry's Statement of Environmental Values. Where the public views a Ministry of the Environment policy as inconsistent with the Ministry's Statement of Environmental Values, the Minister should be politically accountable for her decision to promote the policy.

Application to Ministry of the Environment Regulation-Making

The proposed Environmental Bill of Rights will apply to all regulations and significant amendments to regulations which are made under one of the Ministry's prescribed Acts and which have a significant environmental impact or the potential for significant environmental impact. As with policies, there are certain exceptions. Regulations which are administrative, financial, required to address emergencies or merely required to implement a policy or program which has previously been the subject of public participation through placement on the registry, are excluded.

The proposed Environmental Bill of Rights contemplates that Ministry of the Environment "standards", which are fixed limits to the discharge or emission of specific contaminants into the environment, will be established through regulation rather than policy. Such standards regulating air emissions are presently contained in Regulation 308 under the *Environmental Protection Act* are standards regulating water discharges contemplated as future regulations under the *Environmental Protection Act* to implement the Municipal-Industrial Strategy for Abatement (MISA) program.

Subject to the exceptions noted above, the Minister should place environmentally significant draft regulations made under a prescribed Act on the registry for public notice and comment before the regulation is enacted. In the case of controversial regulations, or where the Minister wants to consult the public at a preliminary stage, she may elect to place a notice of intent to make an environmentally significant regulation on the registry and invite public comment on the content of such a regulation. Where the Minister places a notice of intent to regulate on the Environmental Registry System, she should also place notice of the draft regulation, once developed, on the registry.

The Environmental Bill of Rights proposes that the period for comment be a minimum of thirty days before the regulation is enacted. The Minister may extend the time within which comment may be made. Public comment on the regulation should be focused on issues related to the regulation itself, not larger policy issues which have previously been the subject of extensive consultation. For example, a policy establishing the need for controls on excess packaging or a ban on incineration should not be revisited when regulations implementing specific controls are proposed. The focus of the public consultation at this stage should be on whether the proposed regulation effectively establishes those controls in a manner consistent with the Ministry of the Environment's Statement of Environmental Values and policies. This scoping of the consultation avoids a duplication or layering of public participation requirements.

To facilitate meaningful public comment on either the notice of intent to regulate or a draft regulation, the Minister may elect to make a Regulatory Impact Statement (RIS) available to the public. If a RIS is used by the Minister then the Task Force thinks that it should contain the following information:

- a statement of the objectives of the proposed regulation;
- a preliminary assessment of the environmental and economic impacts of the proposed regulation; and
- the reasons why regulation is the preferred means to achieve the desired environmental objective.

Other background material supporting the proposed regulation may be made available to the public through the contact person designated on the Registry.

Where the Minister receives substantive comment on the proposed regulation, she shall give notice to the public of the implementation of the regulation, including a brief explanation of the effect of public comment on the decision-making respecting the regulation (see s.21(2)(3) EBR).

The Minister's compliance with the proposed Environmental Bill of Rights requirements respecting regulations may be the subject of comment by the Environmental Commissioner. In particular, the Commissioner and the public will monitor the content of environmentally significant regulations to ensure that they are consistent with the Ministry of the Environment's Statement of Environmental Values. In this manner, the proposed Environmental Bill of Rights principles of transparency, public involvement in significant environmental decision-making and political accountability for such decisions are achieved.

Proposal to Identify Instruments By Regulation

As previously indicated, Ministry of the Environment instruments issued under a prescribed Act will be subject to the proposed Environmental Bill of Rights public participation regime if they are designated by regulation under the Bill. It is suggested that all substantive Acts administered by the Ministry of the Environment be prescribed by regulation under the proposed Environmental Bill of Rights.

The Task Force suggests that when the proposed Environmental Bill of Rights is passed into law there should be a regulation accompanying the bill which will: .

- prescribe a list of substantive Acts administered by the Ministry of the Environment,
- prescribe by Act and section number the significant environmental instruments issued by the Ministry of the Environment to which the proposed Environmental Bill of Rights public participation regime will apply, and
- prescribe the class or level of public participation required under the proposed Environmental Bill of Rights for each of the designated significant environmental instruments.

Without this regulation, there would be a delay in the application of the Environmental Bill of Rights public participation regime to significant environmental instruments issued by the Ministry.

The Task Force invites public comment on the identification and classification of significant environmental instruments which are issued by the Ministry of the Environment.

Contents of the Proposed Regulation

It will be recalled that the Environmental Registry System classification scheme provides for gradients of public participation corresponding with the magnitude of the environmental decision to be made. Using the classification criteria discussed earlier in this chapter, the Task Force proposes that each of the four classes require the following levels of public participation:

- **Class I** provides a minimum level of notice through the registry, thirty days for comment and notice of implementation including a brief explanation of the effect of public comment on the decision where comment is made;
- **Class II** provides for enhanced notice (by means other than the registry alone), enhanced comment (for a period which may be longer than thirty days and including public meetings, mediation or possibly, negotiation of the instrument) and notice of implementation including a brief explanation of the effect of public comment on the decision where comment is made;
- **Class III** provides for a higher level of public participation in the issuance of instrument, including the opportunity for a hearing before an independent tribunal and the opportunity to negotiate the instrument through alternative dispute resolution mechanisms;

- **Class IV** provides for the highest level of public participation, a mandatory hearing before an independent tribunal.

The Task Force, with the assistance of the Inter-Ministerial Committee, suggests that the following classes of Ministry of the Environment instruments could be considered for inclusion in this regulation:

Class I

Certificate of Approval for Air Emissions

These instruments are issued under section 9 of the *Environmental Protection Act* and are designed to identify and prescribe limits for the release of contaminants into the air. A broad spectrum of activity is regulated by means of these certificates of approval, ranging from the control of odour emissions from fast-food outlets to the identification and control of the emission of contaminants from large industrial chimney stacks. As discussed earlier in this chapter, it is the Task Force's intention that only significant environmental instruments should be subject to the public participation requirements of the proposed Environmental Bill of Rights. The Task Force recognizes that not all section 9 approvals meet this threshold of environmental significance. However, pending the Ministry's reclassification of these instruments into sub-classes (see discussion below), which should identify those air approvals which are extremely significant and warrant a higher classification and those which are not significant enough to warrant any public participation, it is suggested that these instruments be designated as Class I instruments for purposes of public participation.

The majority of such instruments have an environmental impact which can be routinely and effectively mitigated, are of local significance and interest and of low to moderate provincial government interest. It should be noted that the classification scheme under the proposed Environmental Bill of Rights provides for a "bump-up" of Class I instruments to Class II, at the discretion of the Minister responsible for the issuance of the specific instrument. This feature could provide the flexibility necessary to address the more significant air approvals until reclassification is complete.

Unless these instruments are identified and classified in a first regulation under the proposed Environmental Bill of Rights, there will be a delay in the application of the Bill's requirements to the more significant air approvals. The Task Force anticipates that any over-inclusive effect from the initial designation of these instruments as Class I instruments will be addressed by the Ministry of the Environment's proposal to amend the amending regulation (see discussion of reclassification, below).

Certificates of Approval for Private Sewage and Permits for the Use or Operation of Private Class A Sewage Systems

These instruments are approvals of private sewage systems and permits to use approved systems issued by the Ministry under sections 76-78 of the *Environmental Protection Act*. It is proposed that only Class A Sewage Systems with a capacity greater than 4,500 litres per day be included as prescribed instruments under the Environmental Bill of Rights, as these systems would meet the public participation criteria for Class I. It is suggested that smaller private septic tank systems are not significant environmental instruments according to the proposed criteria (see earlier discussion in this chapter).

Water-Taking Permits

These instruments are issued under section 34 of the *Ontario Water Resources Act* to regulate the quantity of water which can be diverted or taken for industrial and other purposes in order to maintain appropriate water supply for downstream users. It is suggested that these instruments meet the criteria of Class I instruments.

Class II

Director's Control Orders

These instruments are issued by the Director under section 7 of the *Environmental Protection Act* where the Director has a provincial officer's report containing a finding that contaminants are being discharged into the environment in contravention of the Act or its regulations. The order requires the owner, occupant or person who has or had the charge, management or control of the source of contaminant to comply with the law by following specific terms and conditions contained in the order. It is suggested that the criteria of environmental impact, geographic extent of impact, public interest and provincial government interest warrant a higher level of public participation than the minimum prescribed for Class I.

Other Director's Orders

Other Director's Orders requiring remedial or preventative work issued under the *Environmental Protection Act* and the *Ontario Water Resources Act* should be considered as Class II instruments under the proposed Environmental Bill of Rights regulation for reasons similar to those of Control Orders. These orders include the following:

Under the *Environmental Protection Act*: Director's Orders to undertake remedial work where there has been harm to the environment (see Section 17); Director's Orders to take preventative measures where the nature of the undertaking or the risk of a discharge of a contaminant is such that the environment may be adversely affected (see Section 18); Director's Order for the removal of waste (see Section 43); Director's Order for Private Sewage Systems (see Section 79); Director's Order for the performance of environmental measures (see Section 136); Director's Instructions for Waste Management of PCBs (see EPA, Reg.11/82).

Under the *Ontario Water Resources Act*: Director's Order prohibiting or regulating the discharge of sewage (see Section 31); Director's Order for preventative measures (see Section 32); Director's Order to regulate water diversion (see Section 34(7)); Director's Order for Sewage Disposal (see Section 91).

Class III

It is suggested that those instruments which are presently issued as a result of a legislative process which provides for a discretionary hearing be included in Class III. The Ministry has already recognized that these instruments have such potential environmental significance that a decision by an independent tribunal may be required. The Ministry's reclassification exercise may result in the expansion of this class, which would now include the following instruments:

Certificates of Approval for Waste Disposal Sites

These are instruments issued under Sections 30 and 32 of the *Environmental Protection Act* for the disposal of waste that is the equivalent of less than 1,500 people. For this particular kind of waste disposal site, the Director may require the Environmental Assessment Board to hold a hearing prior to issuing or refusing to issue the certificate.

Certificates of Approval for Sewage Works

These are instruments issued under Sections 53 and 55(1) of the *Ontario Water Resources Act* approving the establishment or extension of sewage works within a single municipality where the works are not approved under the Municipal Environmental Class Environmental Assessment process. The Director may require the Environmental Assessment Board to hold a hearing prior to granting an approval.

Class IV

This Class will be the smallest class under the proposed Environmental Bill of Rights, as it will include only those instruments of highest environmental significance whose issuance or non-issuance requires an independent decision by a tribunal. It is suggested that this class include the following instruments, all of which are presently subject to a mandatory hearing:

Certificates of Approval for Waste Disposal Sites

Section 30 of the *Environmental Protection Act* provides that the Director must require the Environmental Assessment Board to hold a hearing before issuing or refusing to issue a certificate of approval for sites for the disposal of hauled liquid industrial waste, hazardous waste or waste that is the equivalent to domestic waste of more than 1,500 people.

Certificate of Approval for Sewage Works

Sections 53 and 54(1) of the *Ontario Water Resources Act* provide that the Director must require the Environmental Assessment Board to hold a hearing before granting an approval for sewage works established by a municipality in or into another municipality or territory without municipal organization where these works are not otherwise approved under the Municipal Environmental Class EA under the *Environmental Assessment Act*.

Director's Orders Designating Public Water or Sewage Service Areas

Section 74 of the *Ontario Water Resources Act* provides that the Director must require the Environmental Assessment Board to hold a hearing prior to issuing an order defining and designating an area as an area of public water service or public sewage service or prior to issuing an order controlling water service or sewage service in the area.

The Task Force specifically invites public comment on whether the above instruments are significant environmental instruments and whether the proposed classification of these instruments is consistent with the objectives of the proposed Environmental Bill of Rights. In addition, the public may comment on other environmentally significant instruments which could be prescribed by regulation under the proposed Environmental Bill of Rights and classified for purposes of the public participation regime. The Task Force proposes that the content of the regulation addressing the Ministry of the Environment instruments will be finalized after public consultation and assessment by Ministry staff. A further opportunity for amendment of this regulation to add or delete instruments and reclassify the levels of public participation required for each prescribed instrument is described below.

It is recommended that other Ministries' instruments will be phased-in by regulation, after each Ministry has had an opportunity to follow the Ministry of the Environment's example. These Ministries will be required to designate and classify their instruments in a proposed regulation, which will then be subject to the proposed Environmental Bill of Rights public participation standards for regulations. As other Ministries will have time during transition to assess thoroughly the designation and classification of their significant environmental instruments, the time for reclassification which is provided to the Ministry of the Environment will not be available to them.

Reclassification of Instruments Into Sub-Classes

A significant feature of the proposed Environmental Bill of Rights public participation regime is the opportunity given to the Ministry of the Environment to examine the content of its initial regulation within a specified time and, where necessary, develop a proposal for the reclassification of designated instruments. This reclassification exercise is designed to allow the Ministry of the Environment to examine instruments which cover a broad spectrum of activity and determine what the appropriate level of public participation should be for each type of activity captured by that instrument. In conducting this exercise, the Ministry of the Environment should have regard to the principles of the proposed Environmental Bill of Rights, to the classification criteria it provides and to the need for focused, meaningful public participation. The latter may entail a cost benefit analysis, minimizing additional and unnecessary cost and delay.

The Task Force has identified air emissions approvals issued under section 9 of the *Environmental Protection Act* as a type of instrument which requires this kind of examination for purposes of reclassification into sub-classes. Approvals of this kind are presently issued without statutory public notice or opportunity to comment. The proposed Environmental Bill of Rights could require these approvals to be treated as Class I for purposes of public participation, until a reclassification is completed. This reclassification may result in the identification of certain types of air emission approvals which merit Class II, III or possibly Class IV treatment. It may also result in the identification of approvals which do not merit a Class I treatment and which should be exempt from the proposed Environmental Bill of Rights public participation requirements.

The Task Force is not recommending that the Ministry of the Environment undertake this reclassification exercise prior to the passage of the bill. Significant resources and time will be required to complete this exercise in a well-reasoned way which is consistent with the principles of the Bill. Once the reclassification is complete, the Ministry of the Environment should propose an amendment to the initial regulation and the public participation requirements of the Bill as they relate to regulations will apply.

Reclassification: Class I to Class II

The proposed Environmental Bill of Rights will also provide for the reclassification of individual instruments from Class I to Class II, as described earlier in this chapter. The Task Force anticipates that criteria for a bump-up in the level of public participation may be provided in the regulation accompanying the Bill, when it is passed. For example, the Minister may determine that a particular instrument in Class I, such as a water-taking permit under the *Ontario Water Resources Act*, an air emissions approval under the *Environmental Protection Act* or a Class A Private Sewage Certificate of Approval under the *Environmental Protection Act*, is of sufficient public interest having regard to the proposed Environmental Bill of Rights classification criteria that there should be a Class II level of public participation before that particular instrument is issued.

Once the Ministry of the Environment has completed its reclassification exercise and the identity and classification scheme of significant environmental instruments is fixed, the Minister should not have discretion to reclassify individual instruments to a lower level of public participation than that provided for the class. This means that the Minister cannot require that a Class II instrument be treated as a Class I instrument once the reclassification discussed in section (i) above is complete unless she first amends the regulation made under the Environmental Bill of Rights. Any such amendment would be subject to the Environmental Registry System requirements under the proposed Bill.

Consolidation of Instruments Into One Approval Process

It may be possible for an applicant for a number of different approvals to consolidate these into one process. The proposed Environmental Bill of Rights will suggest that consolidation be permitted where the Ministry (or possibly, Ministries) and the applicant consent to such a procedure. In such circumstances, the highest level of public participation required for any one instrument would dictate the level of public participation required for all of the consolidated instruments.

For example, a company needing an air emission certificate of approval (Class I), an Industrial Wastewater Approval (possibly, Class II) and a water-taking permit (Class I) may be able to apply for all three approvals in one Class II process. The Ministry of the Environment has recently begun a pilot project to test the feasibility and effectiveness of multi-media approvals to prevent pollution (see discussion earlier in this chapter).

Fast-Tracking

Another significant feature of the proposed Environmental Bill of Rights public participation regime is the opportunity to "fast-track" the approvals process. The goal is to offer incentives to the applicant who provides for public consultation at the earliest stages of decision-making by reducing the requirements for public participation at later stages of the process. "Fast-tracking" was discussed earlier in this chapter.

For example, if a company is seeking a approval for industrial sewage works under the *Ontario Water Resources Act* (possibly, a Class II instrument), the applicant will know that the proposed Environmental Bill of Rights requires public notice beyond merely that on the Registry and an opportunity for public consultation in writing, at open houses or at meetings. Where the company undertakes this kind of public consultation at the earliest stages, possibly even before a completed application for the approval is received by the Ministry of the Environment, it should be possible to identify and address local public concerns about the activity covered by the instrument. It may even be possible for the company and the affected community to negotiate and agree on the applicant's proposed application for approval. Where this occurs, and the Ministry of the Environment Director can be satisfied that his or her requirements respecting necessary conditions have been met, the proposed Environmental Bill of Rights requirements for public participation can be met in an efficient way and possibly reduced (one public meeting instead of several, as an example). In such cases, the Ministry should undertake to issue the approval in a reasonable and timely way.

The Integration of the Environmental Bill of Rights and the *Environmental Assessment Act*

The Task Force recommends that the *Environmental Assessment Act* (EAA) be included as a prescribed Ministry of the Environment Act to ensure that policy decisions and regulations made under the *Environmental Assessment Act* are subject to the proposed Environmental Bill of Rights requirements respecting public participation. This means that all exemptions under the *Environmental Assessment Act* which are currently made by order or regulation, generally without advance notice to the public or an opportunity for public consultation will now be required to be placed on the Registry for public notice and comment prior to being enacted. The Minister will retain discretion to place environmentally significant policies made in furtherance of the *Environmental Assessment Act* on the Registry for public notice and comment, and her actions in this regard will be subject to the scrutiny and comment of the Environmental Commissioner. Both regulations and policy made under the *Environmental Assessment Act* should be compliant with the Ministry of the Environment's Statement of Environmental Values and may be the subject of comment by the public and/or the Environmental Commissioner where they are not. This provides a method that permits political accountability for Ministry of the Environment decisions in the areas of *Environmental Assessment Act* policy and regulation making.

For the reasons described earlier in this chapter, the requirements of the instrument component of the proposed Environmental Bill of Rights public participation regime will not apply to those instruments which are necessary to implement a decision made under the *Environmental Assessment Act*. This means that a proponent who obtains approval for an undertaking under the *Environmental Assessment Act*, for example under a Class Environmental Assessment, will not be required to engage in a further public consultation in order to obtain an instrument from the Ministry of the Environment which is necessary to complete the undertaking, nor would the issuance of that instrument by the Ministry be subject to possible appeal by the public. It is for this reason, for example, that it is suggested that the *Ontario Water Resources Act*, section 54(1) and section 55(1) municipal sewage work approvals only be captured by the proposed Environmental Bill of Rights public participation requirements where the sewage works are not proceeding under the Municipal Environmental Class Environmental Assessment.

The Public's Ability to Appeal Class I and Class II Instruments

A principle of the proposed Environmental Bill of Rights is that members of the public have greater access to justice where government makes significant environmental decisions. As was indicated in Chapter 2, under present law the public does not have an ability to challenge the quality of an instrument issued by the Ministry of the Environment to another person and to seek a review of the Ministry's decision by an independent tribunal. The proposed Environmental Bill of Rights suggests a change to this state of the law. In the context of the public participation regime respecting instruments, the proposed Environmental Bill of Rights provides members of the public with a limited right to appeal instruments issued by the Ministry of the Environment whre there is an existingright to appeal for the applicant and where the public believes the instrument is unreasonable having regard to the Ministry's laws, regulations and policies. As the decision to issue an instrument under Classes III and IV may be negotiated or made by an independent tribunal for which there are existing avenues of review, the new appellate rights are limited to Class I and Class II instruments.

Where the Ministry of the Environment decides to issue an instrument approving certain activity, and a member of the public believes that the instrument is unreasonable having regard to the Ministry's laws, regulations and policies which govern the issuance of the instrument, that person may seek leave to appeal the instrument to an independent tribunal. Within the Ministry of the Environment, and until the transition phase of the proposed Environmental Bill of Rights begins to bring other Ministries on line, that tribunal will be the Environmental Appeal Board.

The proposed Environmental Bill of Rights provides that a person seeking leave to appeal the issuance of a Class I or Class II Ministry of the Environment instrument bring a motion for leave to appeal before a single member of the Environmental Appeal Board within fifteen days of the decision to issue the instrument. The test for succeeding on a leave application is two-fold. The first step will be for the member of the public to satisfy the board that he/she is entitled to challenge the instrument. This "standing" test requires the person to establish to the board's satisfaction that he/she has a demonstrable interest in the issuance of the instrument, usually evidenced by prior participation in the issuance of the instrument. The second component of the test for leave to appeal is to satisfy the board that the request for appeal has preliminary merit. The factors the board will look to in deciding whether or not these tests have been met are discussed earlier in this chapter.

Where leave to appeal is granted to a member of the public, the matter will proceed to a hearing before the board. Where leave to appeal is denied, the proposed Environmental Bill of Rights provides that there be no further appeal of this decision.

How will the proposed Environmental Bill of Rights change the way in which the public participates in environmentally significant decision making by the Ministry of the Environment?

Let us consider the following example:
A company submits an application to the Ministry of the Environment for an air emissions approval under section 9 of the *Environmental Protection Act*. The company operates a manufacturing concern located near a residential community and a public park containing a sensitive wetland.

How can the public participate in the issuance of an *Environmental Protection Act* air approval?

At present, the *Environmental Protection Act* does not require public notice of the company's application for approval, nor does it provide an opportunity for the public to comment on whether the approval should be issued or what its conditions should be. The Act does not require the Ministry of the Environment to notify the public once an approval has been issued. The Ministry's policy respecting public consultation is discretionary and variable; it does not address public participation in the issuance of air approvals. Thousands of such approvals are issued annually by the Ministry of the Environment. The Act does require the Ministry to keep an alphabetical index record of the names of all persons to whom approvals have been directed. A member of the public can contact the Ministry directly and review the index. However, the law only requires the Ministry of the Environment to create index records after the approval has been issued, not before. As a matter of practice, the Ministry of the Environment has had a computerized record for tracking approvals issued by the Approvals Branch since 1986. However, this system does not include approvals which are issued by the Ministry's regional offices.

The proposed Environmental Bill of Rights will make dramatic changes to the above scenario.

The *Environmental Protection Act* would be a prescribed Act under the proposed Environmental Bill of Rights and the Ministry of the Environment would therefore be required to develop a Statement of Environmental Values integrating the purposes of the Environmental Bill of Rights with other traditional economic, social and scientific considerations of the Ministry. This Statement of Environmental Values would be developed with public notice and comment and would establish the principled framework within which the Ministry of the Environment would operate.

It is suggested that an *Environmental Protection Act*, section 9 air approval be a Class I instrument (pending reclassification as described above) for purposes of the proposed Environmental Bill of Rights public participation requirements. A Class I instrument could be "bumped-up" to a Class II level of public participation. For the purposes of this example, let us assume such a "bump-up" has occurred. A Class II instrument provides for enhanced notice and opportunity to comment; notice of implementation, including a brief explanation of the effect of public comment on the decision to issue the approval, where comment is received; and an opportunity for a member of the public to seek leave to appeal the issuance of the instrument to the Environmental Appeal Board.

In our example, these requirements would have the following effects:

The Ministry of the Environment must place notice that the company has applied for an approval on the Electronic Registry System no later than the date on which the company's completed application for the approval is received. Access to the Registry may be through the local library, the local MPP's office or possibly, by computer modem. In addition, direct notice of the application for approval through mailings or newspaper advertisements to residents in the company's neighbourhood may be provided.

The public will have thirty days as a minimum to comment on the proposed approval. The period for comment may be extended by the Minister. Comment may be made in writing, and orally at a public meeting or open house conducted to encourage public participation in the decision to issue the instrument. The public may also have an opportunity to become directly involved with Ministry officials and the company in discussions respecting the terms and conditions of the approval.

Once a decision is made to issue the instrument, notice of the decision, including an explanation of the effect of public comment on the decision, must be provided by the Ministry. The public will have access to the reasons through the registry or a contact person at the Ministry of the Environment.

What happens where the Ministry of the Environment fails to place the approval on the registry for public notice and comment?

The proposed Environmental Bill of Rights would make the public participation requirements respecting placement of an instrument on the registry a statutory duty. Where the ministry fails to meet this duty, a member of the public may bring a motion for judicial review requiring the Ministry to place the approval on the registry. An approval which has been issued in a way which is not consistent with the requirements of the public participation regime may be voidable under a process to be prescribed by regulation under the proposed Environmental Bill of Rights. This regulation would also provide that minor procedural irregularities in the issuance of the instrument will not affect its status.

In addition, the Environmental Commissioner may comment on the Ministry of the Environment's compliance with the proposed Environmental Bill of Rights requirements when he or she reports to the Legislature.

What happens where an unreasonable approval results despite public participation in its issuance?

In our example, the company has a right to appeal to the Environmental Appeal Board where the Director refuses to issue the approval or where the Director imposes terms or conditions in the approval (see s.124 EPA). A member of the public would have fifteen days from the date the decision is made to bring a motion for leave to appeal the approval before a single member of the Environmental Appeal Board. For example, a neighbour who has fully participated in the prior consultative process for the approval and who could successfully establish that the approval, as issued, is unreasonable having regard to the Act, regulations (if any) and policies which govern the issuance of the approval might succeed in obtaining leave to appeal. Where leave to appeal is granted, the Environmental Appeal Board would review the approval and might substitute its decision for that of the Director who issued the approval. The Environmental Bill of Rights proposes that the appeal be conducted in the same way as an appeal which might be brought by the company to contest terms and conditions in the approval or the failure to issue an approval.

What happens if an approval is granted by the Ministry of the Environment and a person's application for leave to appeal the approval is dismissed?

The proposed Environmental Bill of Rights would not provide for an appeal from a decision refusing a person leave to appeal. However, the concerned member of the public might bring the matter to the attention of the Environmental Commissioner. The Commissioner might then take steps to address the situation and might comment on the Ministry of the Environment's actions to the Legislature.

What happens if the applicant is granted an approval but fails to comply with it?

In the above example, a member of the public who has reasonable grounds to believe that the company is not complying with the terms and conditions of its approval could contact the company and attempt to work out any problems on an informal basis or could advise the Ministry of the Environment of the non-compliance by telephone or letter. This is the present law.

The proposed Environmental Bill of Rights would enable a person to formally make an Application for Investigation of a contravention where the Ministry of the Environment didn't respond to the satisfaction of the person making the complaint. The Application for Investigation is discussed in detail earlier in this chapter. The important thing to note is that making an application would require the Ministry to investigate and respond in writing, indicating what action, if any, the Ministry proposes to take. The Application for Investigation might result in the company being prosecuted and/or being subject to administrative actions (such as Director's Orders) to abate the environmental harm caused by its non-compliance with the approval. Since an *Environmental Protection Act* Director's Order might be a Class II instrument under the proposed Environmental Bill of Rights regulation, the person would be entitled to notice and an opportunity to participate in the development of the order.

In addition to the Application for Investigation, a concerned member of the public might apply for a review of the approval under the proposed Environmental Bill of Rights. Where, for example, the approval was issued by the Ministry more than five years ago, without public consultation, and there is cogent new scientific or technological evidence indicating that environmental harm could be reduced through more stringent controls in the approval, the Minister might review the adequacy of the company's approval.

Under another scenario, where the company's activity is causing harm to the environment and this harm is unregulated by the Ministry of the Environment or is not within the parameters of a Ministry policy or guideline, the public might use the Application for Review to prompt the ministry to develop the necessary regulation or policy.

The ministry's actions with respect to the Application for Investigation and the Application for Review would be monitored by the Environmental Commissioner and might be the subject of comment in his/her biennial Report to the Legislature.

What happens if the Ministry of the Environment doesn't respond to an Application for Investigation and the company's non-compliance with its approval is causing environmental harm to the nearby public park and its sensitive wetlands?

At present, a member of the public in this situation would have no recourse to the courts unless he/she could establish a direct harm to his/her property, person or financial interests. A person cannot access the courts on principle alone where that principle is that the environment or public resources are being harmed through the actions of another. The proposed Environmental Bill of Rights would increase access to the courts for such principled litigants.

Where the Ministry of the Environment fails to act on a person's Application for Investigation and actual harm to a public resource (such as a public park over a certain size) is being caused or is imminent, that person might commence an civil action under the proposed Environmental Bill of Rights to obtain an injunction to stop the harm and an order to restore the damage done to the park and its wetlands. The details of this new civil action are explained earlier in this chapter.

E. APPLICATION OF THE PROPOSED ENVIRONMENTAL BILL OF RIGHTS

(ii) To the Ministry of Natural Resources

In the previous section, the Task Force described how the proposed Environmental Bill of Rights could apply to the statutes administered by the Ministry of the Environment. Integrating the public participation requirements of the proposed Environmental Bill of Rights with existing Ministry of Environment decision-making processes will be an essential part of the Bill's implementation. Other ministries need to watch this exercise very closely, in order to learn from the Ministry of the Environment's experience. The Task Force acknowledges that due to the divergent nature of existing decision-making processes in the various ministries that might be affected by the Environmental Bill of Rights, the participatory regime will have to be implemented in a variety of ways to bring existing processes into substantial compliance with the Bill's requirements. As stated earlier the Task Force wants to ensure that the Bill's requirements are not merely superimposed on existing decision-making processes, resulting in duplicative public consultation, and a more onerous and complex instrument-issuance regime. The goal of implementation of the proposed Environmental Bill of Rights should be to identify those areas where consultation is currently lacking, and to bring those processes up to a level that is substantially in compliance with the Environmental Bill of Rights.

Integration of the Environmental Bill of Rights participatory scheme with the Ministry of the Environment processes is somewhat simpler than other ministries, because many of the crucial "trade-offs" are made at the instrument-issuance stage. The Task Force recognizes that the Ministry of Natural Resources does not share this instrument-driven decision-making process to the same degree. Instead, many of the directions about resource management are provided through a hierarchical decision-making process which starts from the level of land use planning, proceeds through to the resource management plan level and then finally to the issuance of instruments. In these circumstances, simply applying the Environmental Bill of Rights notice and comment requirements to the issuance of instruments could potentially duplicate previous planning and consultation processes.

In many situations faced by the Ministry of Natural Resources, the achievement of the Environmental Bill of Rights principles and the broader public interest may be best served by applying Environmental Bill of Rights notice and comment procedures at the early stage, that is, at the level of land use and resource management planning, instead of permit and licensing activity. The Task Force recognizes that work needs to be done on detailing how the Environmental Bill of Rights proposals are to be integrated with the existing Ministry of Natural Resources planning and decision-making framework if duplication is to be avoided.

The Task Force further acknowledges that the Ministry of Natural Resources is already in the process of establishing forums to provide the public with opportunities for participation in the development of strategic policies which direct the management of natural resources. This would include, for example, the recent establishment of an independent panel to conduct public consultations and to provide recommendations to the Minister of Natural Resources on the development of a Comprehensive Forest Policy. In addition, the Ministry of Natural Resources is also proposing to undertake a review of its land use and resource planning system. Four key areas have been identified for review:

- decision-making (Provincial interest, local empowerment, and native self-government);
- fairness (conflict resolution, appeal, amendment procedures);
- ecological principles and approaches; and
- integration of planning.

Public review of proposals is scheduled for late 1992 with final proposals to Government by late 1993.

As well, many decisions on activities and undertakings fall within the scope of the *Environmental Assessment Act* and the *Planning Act*. Consideration must be given to the reform initiatives that are currently underway, and the subsequent changes that will be proposed to both regimes.

Therefore, at this time, the Task Force feels that it is not in the position to develop a preliminary integration scheme for the Ministry of Natural Resources as is outlined for the Ministry of the Environment. Rather, the Task Force attempted to identify the regimes that it feels should be made consistent with the principles of the Environmental Bill of Rights. The Task Force believes that decisions made under the following Acts could provide the public with an opportunity to participate in government decision-making in a way which is substantially compliant with provisions of the Bill:

- the *Aggregate Resources Act*,
- the *Conservation Authorities Act*,

- the *Crown Timber Act*,
- the *Lakes and Rivers Improvement Act*,
- the *Mining Act*,
- the *Petroleum Resources Act*,
- the *Public Lands Act*,
- the *Provincial Parks Act*, and
- the *Endangered Species Act*.

When the Minister of Natural Resources is preparing to pass either a regulation or a policy under one of the above Acts, he/she could ensure that the requirements of the proposed Environmental Bill of Rights for notice and comment on the Environmental Registry System are followed. The Task Force recommends that with respect to policies and regulations, the requirements of the proposed Environmental Bill of Rights apply to the above Acts immediately. The Task Force acknowledges that with respect to the *Mining Act*, the Ministry of Northern Development & Mines is responsible for the promulgations of policies and regulations under that regime.

Determining how the Environmental Bill of Rights could apply to the issuance of instruments under Ministry of Natural Resources legislation presents a more complicated problem. The Task Force recognized these difficulties and adopted the following principles in order to provide for the smooth integration of the proposed Bill with existing regimes (see discussion earlier in this Chapter). The Task Force decided that Environmental Bill of Rights provisions with respect to the issuance of instruments would not apply where:

- instruments are issued to implement a decision which has been made through a consultative process before an independent tribunal;
- instruments are issued to implement decisions made under the *Environmental Assessment Act*.

To begin the implementation process, the Task Force recommends that the Ministry of Natural Resources, have regard for the spirit and principles of the Environmental Bill of Rights as set out in this Report, and the provisions of the draft Bill, and begin to prepare a proposal as soon as possible of how it envisions the Environmental Bill of Rights affecting existing decision-making processes. In some cases, the Ministry may find that a classification scheme similar to the approach taken by the Ministry of Environment, is appropriate. For instance, section 14 of the *Lakes and Rivers Improvement Act*, which provides for instruments for the construction of dams, may prove to be a perfect candidate for such a graduated approach.

In other cases, the Ministry may recommend that public participation requirements be available at the resource management and land-use planning levels, simply because this is where the key decisions are made. For example, under the *Crown Timber Act*, critical issues are dealt with during the development of timber management plans, long before individual instruments are issued under that regime. Therefore, in those instances, the public consultation requirements of the Environmental Bill of Rights might be better imposed when the Ministry is preparing the plan, and not necessarily at the stage of issuing individual instruments. As a part of that planning process, the Ministry, in consultation with the public, could identify when further public consultation is required at the instrument-issuance stage, as the plan is being implemented. This approach would enable the Ministry of Natural Resources to pursue these matters in conjunction with the proposed review of its land use and resource planning system.

For example, issues of public consultation in the implementation of timber management plans are, in fact, being considered as part of the current public hearing on the Class Environmental Assessment for Timber Management on Crown Lands in Ontario. The Task Force believes that decisions with respect to the issuance of individual instruments under this type of regime could be made more appropriately in the context of such planning processes.

The Task Force proposes that the Ministry of Natural Resources immediately begin to develop a report analysing the following issues:

- which statutes administered by the Ministry of Natural Resources should be subject to the proposed Environmental Bill of Rights;
- which statutes should be immediately subject to the Environmental Bill of Rights' public participation requirements with respect to policy and regulation-making, and which should be phased-in at a later date; and
- which instruments, if any, under these statutes should be subject to the proposed Environmental Bill of Rights' public participation requirements and what should be the appropriate classification for these instruments.

The assistance of the Ministry of the Environment should be available to the Ministry of Natural Resources as it prepares this report. A report detailing the results of this analysis should be completed as soon as is practicable after the proclamation of the proposed Environmental Bill of Rights. The Task Force views this report as an important step toward the integration of the proposed Environmental Bill of Rights' public participation scheme with existing Ministry of Natural Resources regimes. This integration should take place as soon as is practically possible.

The Task Force recognizes that such an integration process will raise a number of difficult question. However, it believes that public comment on the report will provide for a discussion and, in many cases, a resolution of these questions.

In this chapter the Task Force has set out the conceptual framework of the proposed Environmental Bill of Rights and examples of how it could apply to two of the key government Ministries that make significant environmental decisions.

The Task Force believes that these proposals, in combination, will provide the tools necessary to hold government to its responsibility to protect the environment. They will also provide the public with the means to "get involved" in the protection of the environment.

In the next part of this chapter, a proposed Environmental Bill of Rights is provided which reflects the Task Force's conceptual framework and many of the details necessary to make such reforms take root. As in other major reforms, some of the details will need to be implemented by regulation. Extensive power for the making of such regulations is provided in the proposed Bill.

In the case of the Environmental Bill of Rights some of its key components such as the instrument classification system, the details of the Office of the Environmental Commissioner and, for example, the Acts, regulations and instruments most affected, are provide for in the regulation-making section. Public comment on this and other aspects of the proposed Environmental Bill of Rights are expected and welcome. It may be desirable to incorporate more of those aspects of the reform directly into the Environmental Bill of Rights itself, rather than having them in the form of regulations. This issue should be revisited after the public comment period.

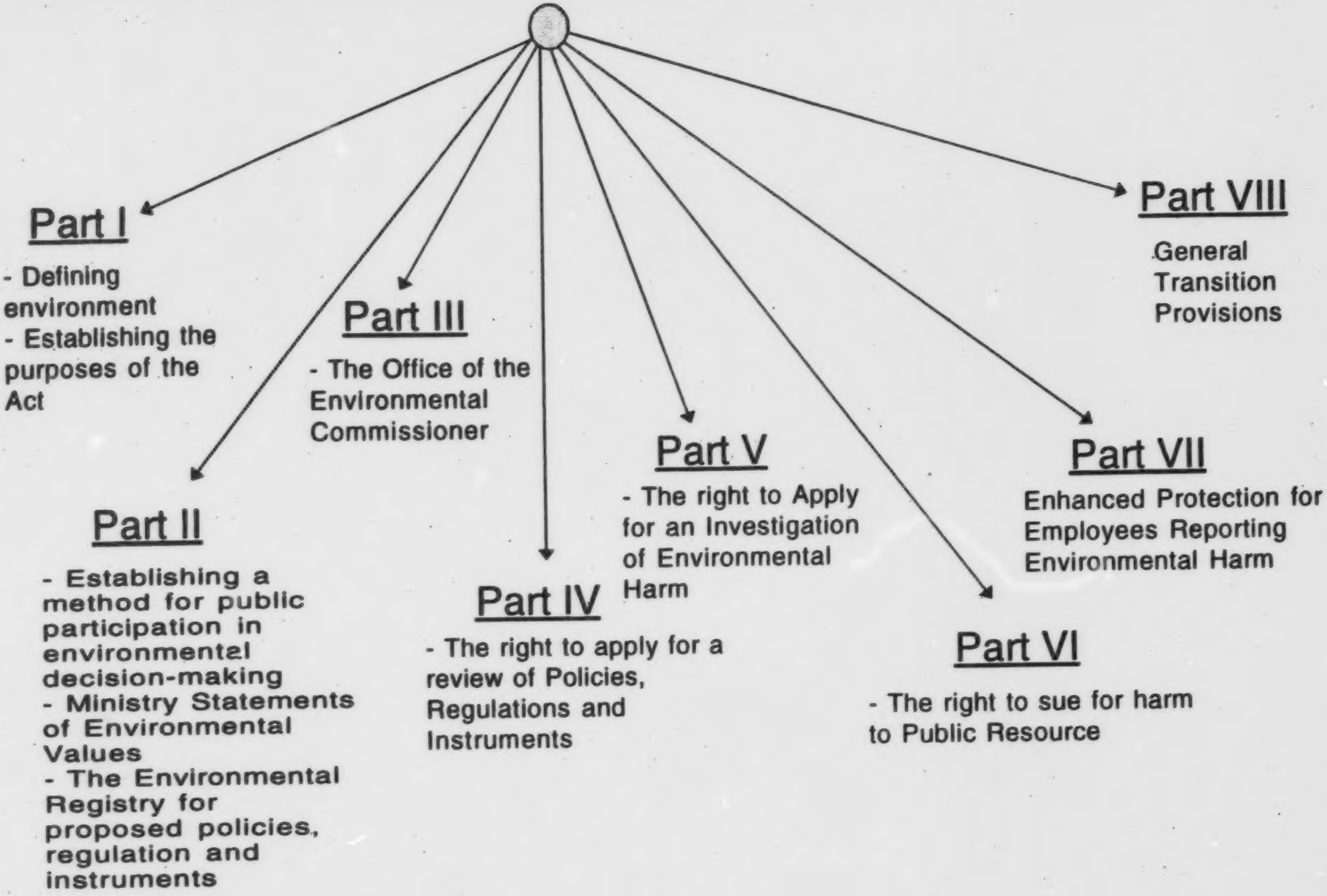
The Task Force invites analysis and comment and urges consideration of the Report, along with the Environmental Bill of Rights, as they are designed to work together during this next period of development.

F. AN ACT RESPECTING ENVIRONMENTAL RIGHTS IN ONTARIO

On the next page, a schematic overview of the proposed Environmental Bill of rights is set out.

Following that overview is the draft legislation itself--*"An Act Respecting Environmental Rights in Ontario."* Its 78 sections should be read in conjunction with this report. One should also be mindful of the fact that the design contemplates an extensive set of regulations which will describe such things as the Ministries, Acts, regulations and instruments to which the Environmental Bill of Rights would apply.

THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS



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PART VIII - GENERAL

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Preamble
The people of Ontario have as a common goal the preservation and protection of our natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

Definitions

1. In this Act,

"air" means open air not enclosed in a building, structure, machine, chimney, stack or flue;

"environment" means the air, water, land, plant life, animal life and ecological systems of Ontario;

"instrument" means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation;

"land" includes wetland and land covered by water but does not include land enclosed in a building;

"prescribed" means prescribed by the regulations under this Act;

"proposal for a policy" means a proposal for a program, plan or objective and includes a proposal for guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments;

"registry" means the environmental registry established under section 10;

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act;

"water" includes ground water;

"wetland" means land,

(a) that is seasonally or permanently covered by shallow water, or

(b) in respect of which the water table is close to or at the surface,

so that the presence of abundant water has caused the formation of hydric soils and has favoured the dominance of either hydrophytic or water tolerant plants.

Purposes of Act

2.-(1) The purposes of this Act are,

(a) to protect, conserve and, where reasonable, restore the integrity of the environment as provided in this Act;

(b) to provide sustainability of the environment for the benefit of present and future generations as provided in this Act; and

(c) to protect the right of present and future generations to a healthful environment as provided in this Act.

Idem

(2) The purposes set out in subsection (1) include the following:

1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.

2. The protection and conservation of biological, ecological and genetic diversity.

3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

5. The identification, protection and conservation of ecologically sensitive areas or processes.

Idem

(3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;

(b) increased accountability of the Government of Ontario for its environmental decision making;

(c) increased access to the courts by residents of Ontario for the protection of the environment; and

(d) enhanced protection for employees who take action in respect of environmental harm.

Application of Part

3. This Part applies to prescribed Ministers and Ministries.

Means of giving public notice

4. Notice to the public under this Part shall be given in the registry and by any other means the Minister giving the notice considers appropriate.

Ministry Statement of Environmental Values

5. As soon as possible after this Part begins to apply to a Ministry, the Minister shall develop a Ministry statement of environmental values that,

(a) explains how the purposes of this Act are to be considered when decisions that might significantly affect the environment are made in the Ministry; and

(b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision making in the Ministry.

Public participation in developing statement

6.-(1) The Minister shall give notice to the public that he or she is developing the Ministry statement of environmental values.

Idem

(2) The notice shall include any information that the Minister considers appropriate and shall invite comments from members of the public on what should be in the statement.

Notice of statement

7.-(1) As soon as possible after developing the Ministry statement of environmental values, the Minister shall give notice of the statement to the public.

Idem

(2) The notice shall include a brief explanation of the effect, if any, of comments from members of the public on the development of the statement and any other information that the Minister considers appropriate.

Amending the statement

8.-(1) The Minister may amend the Ministry statement of environmental values from time to time.

Idem

(2) Sections 5 to 7 apply, with necessary modifications, to amendments of the statement.

Effect of statement

9. The Minister shall take every reasonable step to ensure that the Ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the Ministry.

Registry

10. An environmental registry shall be established in accordance with the regulations under this Act.

Purpose of registry

11. The purpose of the registry is to provide a means by which notice of proposals and decisions that might affect the environment can be given to the public.

Registrar

12. A registrar shall be appointed under the Public Service Act to administer the registry.

Proposals for policies and Acts

13.-(1) If the Minister considers that members of the public should have an opportunity to comment on a proposal for a policy or proposal for an Act under consideration in his or her Ministry because the policy or Act could have a significant impact on the environment, the Minister shall give notice of the proposal to the public.

Proposed changes to policies, Acts

(2) For the purposes of this Act, a proposal for the making, passage, amendment, revocation or repeal of a policy or Act is a proposal for a policy or Act.

Proposals for regulations

14.-(1) If a proposal for a regulation under a prescribed Act is under consideration in a Ministry and the regulation could, in the Minister's opinion, have a significant impact on the environment, the Minister shall give notice of the proposal to the public.

Proposed changes to regulations

(2) For the purposes of this Act, a proposal for the making, amendment or revocation of a regulation is a proposal for a regulation.

Exception

(3) Subsection (1) does not apply to a regulation that is predominantly financial or administrative in nature.

Proposals for instruments

15.-(1) Subject to subsection (3), the Minister shall give notice to the public of any proposal under consideration in his or her Ministry for an instrument under a prescribed statutory provision.

Proposed changes to instruments

(2) For the purposes of this Act, a proposal for the issuance, amendment or revocation of an instrument is a proposal for an instrument.

Idem

(3) The Minister need not give notice under subsection (1) of a proposal for an amendment or revocation of an instrument if the Minister considers that the potential impact of the amendment or revocation on the environment is insignificant.

Exception: emergencies

16.-(1) Sections 13 to 15 do not apply where, in the Minister's opinion, the delay involved in giving notice to the public, in allowing time for public response to the notice or in considering the response to the notice would result in,

(a) danger to the health or safety of any person;

(b) harm or serious risk of harm to the environment; or

(c) injury or damage or serious risk of injury or damage to any property.

Idem

(2) If a Minister decides under subsection (1) not to give notice of a proposal under sections 13, 14 or 15, the Minister shall give notice of the decision to the public.

Idem

(3) The notice under subsection (2) shall be given as soon as possible after the decision is made and shall include any information about the decision that the Minister considers appropriate.

Exception: other processes

17. Sections 13 to 15 do not apply where, in the Minister's opinion, the environmentally significant aspects of a proposal for a policy, Act, regulation or instrument,

(a) have already been considered in a process of public participation, under this Act, under another Act or otherwise, that was substantially equivalent to the process required in relation to the proposal under this Act; or

(b) are required to be considered in a process of public participation under another Act that is substantially equivalent to the process required in relation to the proposal under this Act.

Exception: instruments in accordance with statutory decisions

18. Section 15 does not apply where, in the Minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking approved by,

(a) a decision made by a tribunal under an Act after affording an opportunity for public participation; or

(b) a decision made under the Environmental Assessment Act.

Contents of notice of proposal

19.-(1) Notice of a proposal under section 13, 14 or 15 shall include,

(a) a brief description of the proposal;

(b) a statement of the manner by which and time within which members of the public may participate in decision making on the proposal;

(c) an address to which members of the public may direct,

  (i) comments on the proposal,

  (ii) questions about the proposal, and

  (iii) questions about the rights of members of the public to participate in decision making on the proposal;

(d) any information required by the regulations under this Act; and

(e) any information that the Minister giving the notice considers appropriate.

Idem

(2) A statement under clause (1)(b) shall include a description of the rights of participation prescribed by the regulations under this Act and any additional rights of participation that the Minister giving the notice considers appropriate.

Minister to consider comments

20. A Minister who gives notice of a proposal under section 13, 14 or 15 shall take every reasonable step to ensure that all comments relevant to the proposal that are received as a result of the public participation process described in the notice of the proposal are considered when decisions on the proposal are made in the Ministry.

Interpretation

21.-(1) For the purposes of this section,

(a) a proposal for a policy is implemented by the person or body with the authority to adopt the policy;

(b) a proposal for an Act is implemented by the Legislative Assembly; and

(c) a proposal for a regulation or instrument is implemented by the person or body with statutory authority to make, issue, amend or revoke the regulation or instrument.

Notice of implementation of proposal

(2) As soon as possible after a proposal for an Act, policy, regulation or instrument in respect of which notice was given under section 13, 14 or 15 is implemented, the Minister shall give notice to the public of the implementation.

Idem

(3) The notice shall include a brief explanation of the effect, if any, of public participation on decision making on the proposal and any other information that the Minister considers appropriate.

Environmental Commissioner

22.-(1) There shall be an Environmental Commissioner who is an officer of the Assembly.

Appointment

(2) The Lieutenant Governor in Council shall appoint the Environmental Commissioner on the address of the Assembly.

Term of office

(3) The Environmental Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms.

Removal

(4) The Lieutenant Governor in Council may remove the Environmental Commissioner for cause on the address of the Assembly.

Salary

(5) The Environmental Commissioner shall be paid the remuneration and allowances fixed by the Lieutenant Governor in Council.

Staff

(6) The employees and officers that are necessary for the performance of the functions of the Environmental Commissioner shall be members of the staff of the Office of the Assembly.

Temporary appointment

(7) If the Environmental Commissioner dies, resigns or is unable or neglects to perform the functions of his or her office while the Assembly is not in session, the Lieutenant Governor in Council may appoint a temporary Environmental Commissioner to hold office for a term of not more than six months.

Idem

(8) A temporary Environmental Commissioner shall have the powers and duties of the Environmental Commissioner and shall be paid the remuneration and allowances fixed by the Lieutenant Governor in Council.

Functions

23. It is the function of the Environmental Commissioner to,

(a) oversee the implementation of this Act and monitor compliance in Ministries with the requirements of this Act;

(b) provide guidance to Ministries on how to comply with the requirements of this Act, including guidance on how to,

  (i) develop Ministry statements of environmental values, and

  (ii) ensure that Ministry statements of environmental values are considered whenever decisions that might significantly affect the environment are made in Ministries;

(c) conduct educational programs about this Act;

(d) monitor the use of the registry;

(e) monitor the exercise of discretion by Ministers under this Act;

(f) monitor the receipt, handling and disposition of applications for review under Part IV and applications for investigation under Part V;

(g) monitor the receipt, handling and disposition of complaints about employer reprisals under Part VII; and

(h) prepare the biennial report referred to in section 24.

Report

24.-(1) The Environmental Commissioner shall report biennially to the Speaker of the Assembly who shall cause the report to be laid before the Assembly.

Idem

(2) The report shall include,

(a) a report on the work of the Environmental Commissioner and on whether the Ministries affected by this Act have co-operated with requests by the Commissioner for information;

(b) a summary of the information gathered by the Environmental Commissioner as a result of performing the functions set out in section 23;

(c) a list of all proposals of which notice has been given under section 13, 14 or 15 but not under section 21 in the two-year period covered by the report;

(d) any information required by the regulations under this Act; and

(e) any information that the Environmental Commissioner considers appropriate.

Application for review

25.-(1) Any two residents of Ontario who are eighteen years of age or older who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, replaced, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate Minister.

Idem

(2) Any two residents of Ontario who are eighteen years of age or older and who believe that a new policy, Act, regulation or instrument should be adopted, passed, made or issued by Ontario in order to protect the environment may apply to the Environmental Commissioner for a review of the need for the new policy, Act, regulation or instrument by the appropriate Minister.

Idem

(3) An application under subsection (1) or (2) shall be in the form provided for the purpose by the office of the Environmental Commissioner and shall include,

(a) the names and addresses of the applicants;

(b) an explanation of why the applicants believe that the review applied for should be undertaken in order to protect the environment; and

(c) a summary of the scientific evidence supporting the applicants' belief that the review applied for should be undertaken in order to protect the environment.

Idem

(4) In addition, an application under subsection (1) shall clearly identify the policy, Act, regulation or instrument in respect of which a review is sought.

Referral to Minister

26. Within thirty days of receiving an application under section 25, the Environmental Commissioner shall refer it to the Minister or Ministers responsible for the matters raised in the application.

Acknowledgment of receipt

27. A Minister who receives an application for review from the Environmental Commissioner shall acknowledge receipt to the applicants within thirty days of receiving the application from the Commissioner.

Preliminary consideration

28.-(1) The Minister shall consider each application for review under section 25 in a preliminary way to determine whether the public interest warrants the review.

Idem

(2) In determining whether the public interest warrants a review, the Minister shall consider the public interest in not disturbing a decision made in the five years preceding the date of the application if the decision was made in accordance with Part II of this Act.

Idem

(3) In determining whether the public interest warrants a review, the Minister may consider,

(a) the Ministry statement of environmental values;

(b) the potential for harm to the environment if the review applied for is not undertaken;

(c) any social, economic or scientific evidence that the Minister considers relevant; and

(d) any other matter that the Minister considers relevant.

Idem

(4) In addition, in determining whether the public interest warrants a review of an existing policy, Act, regulation or instrument applied for under subsection 25(1), the Minister may consider,

(a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and

(b) how recently the policy, Act, regulation or instrument was made, passed or issued.

Notice of decision whether to review

29. Within 120 days of receiving an application for review under section 25, the Minister shall give written notice of whether he or she intends to conduct the review to,

(a) the applicants;

(b) the Environmental Commissioner; and

(c) any other person who in the Minister's opinion ought to get the notice because the person might be directly affected by the decision.

Notice of completion of review

30.-(1) Within thirty days of completing a review applied for under section 25, the Minister shall give written notice of the outcome of the review to the persons mentioned in clauses 29(a) to (c).

Idem

(2) The notice referred to in subsection (1) shall state what action, if any, the Minister has taken or proposes to take as a result of the review.

Application of Part II

31. Part II applies to a proposal for a policy, Act, regulation or instrument under consideration in a Ministry as a result of a review under this Part.

Application for investigation

32.-(1) Any two residents of Ontario who are eighteen years of age or older and who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate Minister.

Idem

(2) An application under this section shall be in the form provided for the purpose by the office of the Environmental Commissioner and shall include,

(a) the names and addresses of the applicants;

(b) a statement of the nature of the alleged contravention;

(c) the names and addresses of each person alleged to have been involved in the commission of the contravention, to the extent that this information is available to the applicants;

(d) a summary of the evidence supporting the allegations of the applicants;

(e) the names and addresses of witnesses to the alleged contravention, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;

(f) a copy of any document and a description of any material that the applicants believe should be considered in the investigation; and

(g) details of any previous contacts with the office of the Environmental Commissioner or any Ministry regarding the alleged contravention.

Referral to Minister

33. Within thirty days of receiving an application under section 32, the Environmental Commissioner shall refer it to the Minister responsible for the administration of the Act under which the contravention is alleged to have been committed.

Acknowledgment of receipt

34. The Minister shall acknowledge receipt of an application for investigation to the applicants within thirty days of receiving the application from the Environmental Commissioner.

Duty to investigate

35. The Minister shall investigate all matters that the Minister considers necessary in relation to a contravention alleged in an application unless, in his or her opinion,

(a) the application is frivolous or vexatious;

(b) the alleged contravention is not serious enough to warrant an investigation; or

(c) the alleged contravention is not likely to cause harm to the environment.

Notice of decision not to investigate

36.-(1) If the Minister decides that an investigation is not required under section 35, the Minister shall give written notice of the decision to,

(a) the applicants;

(b) each person alleged in the application to have been involved in the commission of the contravention for whom an address is given in the application; and

(c) the Environmental Commissioner.

Idem

(2) The notice referred to in subsection (1) shall be given within 120 days of receiving the application for investigation.

Time required for investigation

37.-(1) Within six months of receiving an application for an investigation, the Minister shall either complete the investigation or give the applicants a written estimate of the time required to complete it.

Idem

(2) Within the time given in an estimate under subsection (1), the Minister shall either complete the investigation or give the applicants a revised written estimate of the time required to complete it.

Idem

(3) Subsection (2) applies to a revised estimate given under subsection (2) as if it were an estimate given under subsection (1).

Notice of completion of investigation

38.-(1) Within thirty days of completing an investigation, the Minister shall give written notice of the outcome of the investigation to the persons mentioned in clauses 36(a) to (c).

Idem (2) The notice referred to in subsection (1) shall state what action, if any, the Minister has taken or proposes to take as a result of the investigation.

Definitions **39.** In this Part,

"court" means the Ontario Court (General Division) but does not include the Small Claims Court;

"harm" means any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation;

"public land" means land that belongs to,

(a) the Crown in right of Ontario,

(b) a municipality, or

(c) a conservation authority;

"public resource" means,

(a) air,

(b) water, not including privately owned bodies of water not within navigable waters,

(c) unimproved public land,

(d) any parcel of public land that is larger than five hectares and is used for,

  (i) recreation,

  (ii) conservation,

  (iii) resource extraction,

  (iv) resource management, or

  (v) a purpose similar to one mentioned in subclauses (i) to (iv), and

(e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d).

Application **40.** Sections 41 to 57 apply only in respect of harm resulting from contraventions that occur after section 41 comes into force.

Right of action

41.-(1) Where a person has contravened or will imminently contravene a prescribed Act, regulation or instrument and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any resident of Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment.

Steps before action

(2) Despite subsection (1), an action may be brought in respect of an actual contravention only if the plaintiff has applied for an investigation into the contravention under Part V and,

(a) has not received one of the responses required under sections 36 to 38 within a reasonable time; or

(b) has received a response under sections 36 to 38 that is not reasonable.

Idem

(3) In making a decision as to whether a response was given within a reasonable time for the purposes of clause (2)(a), the court shall consider but need not be bound by the times specified in sections 36 to 38.

Idem

(4) Subsection (2) does not apply where the delay involved in an application for an investigation or a response to an application for an investigation would result in significant harm or serious risk of significant harm to a public resource.

Idem

(5) Subsection (2) does not apply in relation to a contravention of an Act of Canada or a regulation or instrument under an Act of Canada.

Burden of proof: contravention

(6) The onus is on the plaintiff in an action under this section to prove the contravention or imminent contravention on a balance of probabilities.

Other rights of action not affected

(7) Nothing in this section affects a right of action otherwise available.

Defence

42.-(1) For the purposes of section 41, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the defendant exercised due diligence in complying with the Act, regulation or instrument.

Idem

(2) For the purposes of section 41, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the act or omission alleged to be a contravention of the Act, regulation or instrument is authorized by an Act of Ontario or Canada or by a regulation or instrument under an Act of Ontario or Canada.

Idem

(3) For the purposes of section 41, an instrument is not contravened if the defendant satisfies the court that the defendant complied with an interpretation of the instrument that the court considers reasonable.

Idem

(4) Nothing in this section affects a defence otherwise available.

Attorney General to be served

43.-(1) The plaintiff in an action under section 41 shall serve the statement of claim on the Attorney General not later than ten days after the day on which the statement of claim is served on the first defendant served in the action.

Idem

(2) The Attorney General shall have all the rights and obligations that a party to the action would have under the rules of court.

Idem

(3) Subsection (1) does not apply if the Attorney General has already been served on behalf of the Crown as a defendant in the action.

Public notice of action

44.-(1) The plaintiff shall give notice of the action to the public in the registry and by any other means ordered by the court.

Idem

(2) Within thirty days after the close of pleadings, the plaintiff shall make a motion to the court for directions relating to the notice under this section, including directions as to when the notice should be given.

Idem

(3) The notice shall be in the prescribed form and shall include any information required by the regulations under this Act and any information required by the court.

Idem

(4) The court may dispense with notice under this section or may require a party other than the plaintiff to give the notice.

Costs

(5) The court may make any order for the costs of the notice that the court considers appropriate.

Notice to protect interests

45.-(1) At any time in the action, the court may order any party to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interests at stake in the action.

Idem

(2) The court may make any order relating to the notice, including an order for the costs of the notice, that the court considers appropriate.

Participation in action

46.-(1) In order to provide fair and adequate representation of the private and public interests at stake in the action, the court may permit any non-party to participate in the action or to exercise the rights of appeal of a party.

Idem

(2) Participation under subsection (1) shall be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

Idem

(3) No order shall be made under subsection (1) in an action after the court has made an order under section 49 in the action.

Idem

(4) Nothing in this section affects the orders a court may make under the rules of court.

Stay or dismissal in the public interest

47.-(1) The court may stay or dismiss the action if to do so would be in the public interest.

Idem

(2) In making a decision under subsection (1), the court may have regard to environmental, economic and social concerns and may consider,

(a) whether the issues raised by the proceeding would be better resolved by another process;

(b) whether there is an adequate government plan to address the public interest issues raised by the proceeding; and

(c) any other relevant matter.

Interlocutory injunctions: plaintiff's undertaking to pay damages

48. In exercising its discretion under the rules of court as to whether to dispense with an undertaking by the plaintiff to pay damages caused by an interlocutory injunction or mandatory order, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

Remedies

49.-(1) If the court finds that the plaintiff is entitled to judgment in an action under section 41, the court may,

(a) grant an injunction against the contravention;

(b) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time;

(c) grant declaratory relief; and

(d) make any other order, including an order as to costs, that the court considers appropriate.

Damages

(2) No award of damages shall be made under clause (1)(d).

Farm practices

(3) No order shall be made under this section that is inconsistent with section 2 of the Farm Practices Protection Act.

When order to negotiate not to be made

50. The court shall not order the parties to negotiate a restoration plan if the court determines that,

(a) adequate restoration has already been achieved; or

(b) an adequate restoration plan has already been ordered under the law of Ontario or any other jurisdiction.

Restoration plans

51.-(1) This section applies to restoration plans negotiated by the parties and to restoration plans developed by the court under section 54.

Restoration plans: purposes

(2) A restoration plan in respect of harm to a public resource resulting from a contravention should, to the extent that to do so is reasonable, practical and ecologically sound, provide for,

(a) the prevention, diminution or elimination of the harm;

(b) the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and

(c) the restoration of all uses, including enjoyment, of the public resource affected by the contravention.

Idem

(3) A restoration plan may address harm to a public resource in ways not described in subsection (2), including,

(a) research into and development of technologies to prevent, decrease or eliminate harm to the environment;

(b) community, education or health programs; and

(c) the transfer of property by the defendant so that the property becomes a public resource.

Ide

(4) A provision under subsection (3) shall be included in a restoration plan only with the consent of the defendant.

Restoration plan: provisions for implementation

(5) A restoration plan may include provisions for monitoring progress under the plan and for overseeing its implementation.

Restoration plans: considerations

(6) When negotiating or developing a restoration plan in respect of harm, the negotiating parties or the court, as the case may be, shall consider,

(a) any orders under the law of Ontario or any other jurisdiction dealing with the harm; and

(b) whether, apart from the restoration plan, the harm has been addressed in the ways described in subsection (2).

Restoration plans: payments

(7) A restoration plan may provide for money to be paid by the defendant only if,

(a) the money is to be paid to the Treasurer of Ontario;

(b) the money is to be used only for the purposes mentioned in subsections (2) and (3); and

(c) the Attorney General and the defendant consent to the provision.

Orders ancillary to order to negotiate

52. If the court orders the parties to negotiate a restoration plan, the court may,

(a) make any interim order that the court considers appropriate to minimize the harm; and

(b) make any order that the court considers appropriate,

  (i) for the costs of the negotiations,

  (ii) requiring a party to prepare an initial draft restoration plan for use in the negotiations,

  (iii) respecting the participation of non-parties in the negotiations, and

  (iv) respecting the negotiation process, including, on consent of the parties, an order concerning the use of a mediator, fact finder or arbitrator.

If parties agree on restoration plan

53.-(1) If the parties agree on a restoration plan within the time fixed by the court and the court is satisfied that the plan is consistent with section 51, the court shall order the defendant to comply with the plan.

Idem

(2) For the purpose of determining whether an agreed plan is consistent with section 51, the court may,

(a) appoint one or more experts under the rules of court; and

(b) on consent of the parties, hear submissions or receive reports from any mediator, fact finder or arbitrator involved in the negotiation.

Court developed restoration plan

54.-(1) If the parties do not agree on a restoration plan or if the court is not satisfied that a plan agreed to by the parties is consistent with section 51, the court shall develop a restoration plan consistent with section 51 and, for the purpose, the court may,

(a) order the parties to engage in further negotiations for a restoration plan on the terms that the court considers appropriate;

(b) order one or more parties to prepare a draft restoration plan;

(c) appoint one or more persons to investigate and report back on any matter relevant to the development of a restoration plan;

(d) appoint one or more non-parties to prepare a draft restoration plan; and

(e) make any other order that the court considers appropriate.

Idem

(2) The rules of court respecting court appointed experts apply, with necessary modifications, to the appointment of a person under clause (1)(c) or (d).

Order to implement

(3) The court shall order the defendant to comply with the restoration plan developed by the court.

Binding effect of orders

55. The doctrines of res judicata and issue estoppel apply in relation to an action under this Act as if all past, present and future residents of Ontario were parties to the action.

Costs

56. In exercising its discretion under subsection 131(1) of the Courts of Justice Act with respect to costs of an action under section 41 of this Act, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

Stay on appeal

57. The delivery of a notice of appeal from an order under this Act does not stay the operation of the order, but a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken may order a stay on the terms that the judge considers appropriate.

Public nuisance causing environmental harm

58. No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action in respect of the loss only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

Definition

59. In this Part, "Board" means the Ontario Labour Relations Board.

Application

60. This Part does not apply with respect to employees of an institution within the meaning of the Freedom of Information and Protection of Privacy Act.

Complaint about reprisals

61.-(1) Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.

Reprisals

(2) For the purposes of this section and section 66, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

Prohibited grounds

(3) For the purposes of this section and section 66, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

1. Participate in the making of a policy, Act, regulation or instrument as provided in Part II.
2. Apply for a review under Part IV.
3. Apply for an investigation under Part V.
4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.
5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed Act, regulation or instrument.
6. Give evidence in a proceeding under this Act or under a prescribed Act.

Labour relations officer

62. The Board may authorize a labour relations officer to inquire into a complaint.

Idem

63. A labour relations officer authorized to inquire into a complaint shall make the inquiry forthwith, shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board.

Inquiry by the Board

64. If a labour relations officer is unable to effect a settlement of the matter complained of, or if the Board in its discretion dispenses with an inquiry by a labour relations officer, the Board may inquire into the complaint.

Burden of proof

65. In an inquiry under section 64, the burden of proof that an employer did not take reprisals on a prohibited ground lies on the employer.

Determination by O.L.R.B.

66.-(1) If the Board, after inquiring into the complaint, is satisfied that the employer has taken reprisals on a prohibited ground, the Board shall determine what, if anything, the employer shall do or refrain from doing about the reprisals.

Idem

(2) A determination under subsection (1) may include, but is not limited to, one or more of,

(a) an order directing the employer to cease doing the act or acts complained of;

(b) an order directing the employer to rectify the act or acts complained of; or

(c) an order directing the employer to reinstate in employment or hire the employee, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount assessed by the Board against the employer.

Agreement to the contrary

67. A determination under section 66 applies despite a provision of an agreement to the contrary.

Failure to comply

68. If the employer fails to comply with a term of the determination under section 66 within fourteen days from the date of the release of the determination by the Board or from the date provided in the determination for compliance, whichever is later, the complainant may notify the Board in writing of the failure.

Enforcement of determination

69. If the Board receives notice in accordance with section 68, the Board shall file a copy of its determination, without its reasons, with the Ontario Court (General Division), and the determination may be enforced as if it were an order of the court.

Effect of settlement

70.-(1) If a complaint under section 61 has been settled, whether through the endeavours of the labour relations officer or otherwise, and the settlement has been put in writing and signed, a party to the settlement may file a written complaint with the Board alleging that another party to the settlement has failed to comply with the settlement.

Idem

(2) Sections 62 to 64 and 66 to 69 and subsection 70(1) apply, with necessary modifications, with respect to a complaint alleging failure to comply with a settlement.

Act performed on behalf of employer

71. For the purposes of sections 61 to 70, an act that is performed on behalf of the employer shall be deemed to be the act of the employer.

Powers, etc., of the O.L.R.B.

72.-(1) The provisions of the Labour Relations Act and the regulations under it relating to powers, practices and procedures of the Board apply, with necessary modifications, to an inquiry by the Board into a complaint under section 61 or 70.

Application of provisions of Labour Relations Act

(2) Sections 108, 110, 111 and 112 of the Labour Relations Act apply, with necessary modifications, to an inquiry by the Board into a complaint under section 61 or 70.

Delegation

73. A Minister may authorize in writing any person or group of persons to exercise any of the Minister's duties under this Act.

No judicial review

74.-(1) Except as provided in section 41 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a Minister under this Act shall be questioned or reviewed in any court.

Exception

(2) Any resident of Ontario may make an application under the Judicial Review Procedure Act for a declaration that a Minister failed to comply with the requirements of Part II respecting a proposal for an instrument.

Idem

(3) An application under subsection (2) shall not be made later than fifteen days after the day on which the Minister gives notice under section 21 of implementation of the proposal.

Crown bound

75. This Act binds the Crown

Regulations

76.-(1) The Lieutenant Governor in Council may make regulations,

(a) prescribing any matter referred to in this Act as prescribed;

(b) prescribing Ministers and Ministries for the purposes of Part II;

(c) providing for the establishment and administration of the registry;

(d) specifying purposes for which the registry may be used;

(e) respecting access to the registry;

(f) prescribing fees that may be charged in relation to use of the registry;

(g) respecting the appointment of a registrar under section 12;

(h) prescribing the registrar's duties, functions and powers;

(i) prescribing classes of notice that may be given and must be given in the registry;

(j) prescribing the contents of classes of notice that may be given and must be given in the registry;

(k) prescribing classes of proposals for policies, Acts, regulations and instruments of which notice must be given under section 13, 14 or 15;

(l) prescribing the manner by which and time within which members of the public may participate in decision making on classes of proposals;

(m) providing for exemptions from Part II in respect of any class of proposal for a policy, Act, regulation or instrument;

(n) providing for the notices required under Part II for two or more proposals relating to the same undertaking to be given together;

(o) providing for the public participation processes required under Part II for two or more proposals relating to the same undertaking to be undertaken together;

(p) providing for appeals relating to the issuance, amendment and revocation of instruments under prescribed statutory provisions to the Divisional

Court, the Lieutenant Governor in Council, the Environmental Appeal Board and any other tribunal, including regulations respecting,

(i) who may appeal or move for leave to appeal,

(ii) criteria for granting leave to appeal,

(iii) grounds for appeal,

(iv) intervention or other participation in appeals or motions for leave to appeal,

(v) the time for appeals or motions for leave to appeal,

(vi) the status of instruments pending appeals,

(vii) notice to the public of appeals and motions for leave to appeal, and

(viii) procedures and powers of the body hearing the appeal;

(q) providing the Environmental Commissioner with any powers necessary or advisable for the carrying out of his or her functions under this Act;

(r) prescribing information to be included in the biennial report of the Environmental Commissioner;

(s) prescribing information to be included in a notice to the public of an action under section 41.

Classes

(2) A class under the regulations under this Act may be defined according to any characteristic and may be defined to consist of or to include or exclude any specified member whether or not with the same characteristics.

Acts of Canada

(3) The authority in this Act to prescribe Acts, statutory provisions, regulations and instruments includes the authority to prescribe Acts of Canada, statutory provisions of Canada, regulations under Acts of Canada and instruments under Acts of Canada.

Commencement

77. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

78. The short title of this Act is the Environmental Bill of Rights, 1992.

G. PUBLIC CONSULTATION ON THE PROPOSED ONTARIO ENVIRONMENTAL BILL OF RIGHTS: NEXT STEPS

In this chapter the Task Force has attempted to set out for consideration the issues its members confronted, the choices that were available and the consensus built through education, discussion and goodwill. Given the level of public debate over the last decade, the initial work of the Advisory Committee and the consensus of this Task Force, an obvious question emerges: Is the time for public debate and public consultation over?

The Task Force is of the opinion that, in some respects, it has just begun.

Part III of the Task Force's Terms of Reference provided that the goal of the Task Force was to achieve a consensus on the policy objectives and content of an Environmental Bill of Rights that would be fair and balanced, realistic, minimized potential dislocation in the courts, and was capable of being implemented in a cost effective way.

The Task Force was asked to recommend changes to existing laws only to the extent necessary to achieve the Task Force consensus.

The Terms of Reference provided that the Task Force Report and Environmental Bill of Rights as approved by Cabinet would be released for comment over a reasonable period of time and that any proposed changes to the Environmental Bill of Rights as a result of the public consultation would be placed before the Task Force for consideration. This would allow the Task Force to provide advice to the Minister about possible changes to the Bill as originally designed.

The members of the Task Force agreed to participate in this consensus-building exercise on the understanding that their recommendations and the draft bill would be released to the public for further comment.

The recommendations contained in this chapter and the balance of the report and embodied in the proposed Environmental Bill of Rights represent this Task Force's best effort at a consensus-based approach to reform of environmental decision-making and access to the courts in Ontario for the protection of the environment and protection for workers who report environmental harm. Some will no doubt feel that the recommendations could have been "better", "less tough", "tougher", or at the very least different. Few will agree with virtually every detail or direction of our consensus. The Task Force is not in a position to state that this is the only way to design an Environmental Bill of Rights for the Province of Ontario. However, the Task Force does state forcefully that this is the way that an Environmental Bill of Rights can be brought to Ontario with the unanimous support of key interest groups and stakeholders.

For that reason, the Task Force recommends that the Report and draft bill be made available for public comment as soon as possible. To ensure that the public comment is informed, the release of the report and bill should be accompanied by a communications strategy that informs the public of the issues confronted by the Task Force, the options available and the choices made.

If the Task Force is to be true to its own recommendations about public participation in environmental decision-making, then the public should have "notice" of our report, and an "opportunity to comment". This process could include public education seminars, workshops, conferences, and other opportunities to inform the public. Task Force members have offered to assist in this process of public education.

Following this period of public comment the Government and the Minister of the Environment should in consultation with the Task Force determine whether the proposed Environmental Bill of Rights meets the needs of the people of Ontario, whether it requires amendments or fine tuning and ultimately whether it should be introduced in the Legislature of Ontario for enactment.

Chapter 4

The Ontario Environmental Bill of Rights and Some Special Considerations

In this chapter the Task Force identifies some of the special considerations for certain sectors of Ontario's society. The following sections are not intended to be an exhaustive consideration of how the Environmental Bill of Rights would apply or not apply to these sectors. It is, however, designed to identify some of the more important considerations for these sectors in the context of our discussion of the proposed Ontario Environmental Bill of Rights.

(A) Considerations for Municipalities

The Commission on Planning and Development Reform in Ontario met with the Task Force to discuss the relationship between planning and development reform and the Environmental Bill of Rights.

The Commission on Planning and Development Reform in Ontario has the following Terms of Reference:

1. to examine the relationship between the public and private interests in land use and development,
2. to inquire into, report upon and make recommendations on legislative change or other actions or both, needed to restore confidence in the integrity of the land use planning system, including the following matters:
   a) improvements to the integrity, efficiency, openness, accountability and goals of the land use planning and development review process;
   b) determination of the appropriate roles and relationships of elected officials, administrators, the development industry, interest and lobby groups, the public and the Ontario Municipal Board in the land use planning and development review system; and
   c) protection of the public interest in planning and land development and support of provincial priorities, including environmental and agricultural considerations.

   In inquiring into these matters, the commission is to include the following in its considerations:
   a) the effect of the development industry's concentration and structure on the ability of provincial and local governments to protect the public interest;

b) the appropriate role of provincial and municipal policy in achieving consistent and fair land use planning decisions and the need for any change in provincial legislation;
c) the adequacy of development control tools to implement public policy;
d) the impact of the municipal financial system and large scale infrastructure projects on local planning and development decisions, and

3. to consult widely, undertake research, foster dialogue and make recommendations on amendments to the *Planning Act*, 1983 and other relevant legislation and to undertake other actions needed to achieve its mandate.

Order in Council 1355/91

The Commission's mandate is a broad one that touches in a variety of ways upon environmental decision-making by the Province and municipalities. The *Planning Act* is a key to many important environmental decisions made in this province.

Through consultation it was learned that the Task Force and the Commission approaches for involving the public in important decision-making by government were quite similar, whether it be with respect to the environment or planning and development reform. While this was considered to be a positive development it also raised an important consideration for the Task Force, about whether and how the Environmental Bill of Rights should apply to the *Planning Act*. It was noted that municipalities were not represented at the Task Force meetings and that their perspective on the application of the Environmental Bill of Rights to municipalities and the *Planning Act* would be an important one. Municipalities have a decision-making process for the granting of municipal instruments, such as by-laws, that is separate from provincial decision-making. The Task Force concluded that it would be difficult to apply the Environmental Bill of Rights to municipal instruments without hearing the specific views of representatives of municipalities. In addition, the Task Force wondered whether it would be advisable to apply the Environmental Bill of Rights to the *Planning Act* at all pending the Report of the Commission on Planning and Development in Ontario.

The Task Force concluded that the Environmental Bill of Rights should apply to the *Planning Act*, at least with respect to proposed provincial policies and regulations. The Task Force concluded that it would be appropriate to await the report of the Commission on Planning and Development in Ontario before determining whether instruments issued pursuant to the *Planning Act* should be affected by the Ontario Environmental Bill of Rights. The Commission will deliver a final report within approximately twelve months of the Task Force's report being made public. It is open to the

Commission on Planning and Development Reform in Ontario to consider this report and the proposed Environmental Bill of Rights and to decide whether the approach adopted should be applied to municipal decision-making, and in particular, instruments under the *Planning Act*.

The Task Force urges the Commission and the Government to consider development of a means for incorporating the Environmental Bill of Rights' principal components into the *Planning Act* and municipal decision-making in some way, in order to ensure consistency in decisions made within the two processes as they relate to environmental matters.

The Task Force concluded that applying the Environmental Bill of Rights to municipal instruments in the *Planning Act* at this time would be disadvantageous, as the Commission on Planning and Development Reform recommendations may have a profound impact on the division of powers between the province and municipalities. It is expected that the province may take far more responsibility for an advisory/policy-making role and that the municipalities may have far more responsibility for the issuance of actual instruments. Awaiting the outcome of the Commission's deliberations appears to be a logical approach to changing environmental decision-making in Ontario with respect to planning and development at the instrument level.

(B) Considerations for Labour

The Ontario Federation of Labour met with the Task Force and was consulted by the co-chair on two occasions. As a result, the Task Force considered three matters of interest to labour:

1 the expansion of the *Environmental Protection Act* "whistleblower" protection;
2 the creation of a right to refuse work that might harm the environment; and
3 the need for joint employer-employee committees in the workplace with respect to environmental harm.

In Chapter 3(D) of this report, the Task Force makes specific recommendations for the expansion of "whistleblower" protection to specific prescribed environmental Acts. This will have the effect of making "whistleblower" protection much more widely available for workers in Ontario who report harm to the environment that is being caused in their workplace. As described in that part of Chapter

3, this is one of the important methods by which the public can assist government in meeting its responsibility for protection of the environment and public resources.

Chapter 3(D) also describes the Task Force's consideration of the issue of a right to refuse work that might cause harm to the environment and the issue of joint committees in the workplace. On those issues, the Task Force reached no conclusion for two reasons: firstly, the subject of the right to refuse work that might harm the environment was not a part of the Task Force's mandate. Secondly, the Task Force did not have sufficient time or resources to investigate adequately the many aspects of these issues. For this reason, the Task Force recommends that the Minister of the Environment and the Minister of Labour consider exploring with interested stakeholders, the issues of the right to refuse work that might harm the environment and joint committees for environmental protection. The Task Force did not think that any such analysis need delay the release of the Task Force's report.

The special considerations for labour in the Environmental Bill of Rights concern the need to participate in the education of workers in Ontario about the expanded coverage of whistleblower protection as proposed by this Task Force.

(C) Considerations for Government

It is fairly clear from the Task Force's recommendations that significant resources will need to be devoted to creating the Environmental Registry System and to seeing through the phase-in of the full Environmental Bill of Rights. It has been recommended elsewhere in this report that the government create an implementation team to oversee the phased-in transition to the Environmental Bill of Rights over the next several years. Resources will be needed in each ministry to ensure that they join the Environmental Bill of Rights regime as soon as, and as efficiently as possible.

The Application for Investigation procedure and the Application for Review procedure will create demands upon government to protect the environment. These tools will only be effective if the public receives timely and meaningful responses. Similarly the public will need to understand the purpose of these procedures and their responsible use.

The new cause of action for environmental harm to a public resource may create demands upon the Ministry of the Attorney General. Each proceeding commenced by a resident with respect to environmental harm to a public resource must be served upon the Attorney General, who in turn may become involved in these proceedings. The Ministry of the Attorney General should be aware of this potential demand upon its lawyers and it should undertake an analysis of the likely implications for the judicial system of both the new cause of action and the changes with respect to public nuisance.

The recommended change with respect to enhanced "whistleblower" protection will likely increase the number of incidents in which employees will use this protection. Since the procedure relies upon the Ontario Labour Relations Board, it would be reasonable to expect resource implications for the Board as well. These implications should be investigated as soon as possible.

The Environmental Bill of Rights would empower residents in some unprecedented ways, whether through the Application for an Investigation, the ability to Apply for a Review, the ability to participate in significant environmental decisions, or in the ability to use the courts, in some instances, to protect public resources. This empowerment would be incomplete if the government does not take responsibility for adequately educating the public about the goals and methods of the Environmental Bill of Rights. Passage of the Ontario Environmental Bill of Rights by the Ontario Legislature and its implementation should be accompanied by public information that is accessible to the residents of Ontario so that they understand their new rights and obligations with respect to the environment and are able to have meaningful participation.

The *Environmental Protection Act* (s.180) provides protection for certain Crown employees in connection with lawsuits commenced against them for performance of their day-to-day work, their duties, the exercise of their authority in protecting the environment or their neglect or default in performance of those duties. It does not protect employees or the Crown from responsibility for negligent acts or other torts. Consideration should be given as to whether similar protection should be incorporated into the Environmental Bill of Rights.

(D) Considerations for Lawyers/Judiciary

The Ontario Environmental Bill of Rights will have an impact on those who practice law in the Province of Ontario. The legal profession should consider undertaking a comprehensive continuing legal education to ensure that its members understand the implications of the Environmental Bill of Rights for their clients. In particular the new cause of action for environmental harm to a public resource and the changes with respect to public nuisance will require special consideration by the legal profession and the judiciary.

(E) Considerations for Agriculture

The co-chair, and other members of the Task Force through their networks, met with the Ontario Federation of Agriculture on several occasions to ensure that the Task Force understood the special interests of food producers in an Environmental Bill of Rights context. Food producers have at least two special considerations with respect to the proposed Environmental Bill of Rights, firstly, with respect to farm practices protections, and secondly, with respect to the *Drainage Act*.

With respect to the farm practices protection, agricultural operations in Ontario have available the protection contained in subsection 2(1) of the *Farm Practices Protection Act* with respect to nuisance claims which provide as follows:

> A person who carries on an agricultural operation and who, in respect of that agricultural operation, does not violate
> a) any land use control law;
> b) the *Environmental Protection Act*;
> c) the *Pesticides Act*;
> d) the *Health Protection and Promotion Act*; or
> e) the *Ontario Water Resources Act*,
> is not liable in nuisance to any person for any odour, noise or dust resulting from the agricultural operation as a result of a normal farm practice and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, a noise or dust.

The Task Force considered whether this special protection should continue to be available for agricultural operations in Ontario. It concluded that the *Farm Practices Protection Act* provides an adequate method of controlling complaints about odours, noises or dust emanating from agricultural operations and that that procedure should not be disturbed by the proposed Environmental Bill of Rights.

The *Drainage Act* of Ontario, while a provincial Act, delegates key decisions about drainage systems to local municipalities. While drainage decisions are important to food producers in Ontario, there are also concerns about their effects on Ontario's wetlands. The Task Force concluded that municipal decisions with respect to the powers delegated to them under the *Drainage Act* should not be affected by the proposed Ontario Environmental Bill of Rights at this time. However, future policies and regulations developed by the Province with respect to the *Drainage Act* should be affected by the Environmental Bill of Rights. Key decisions, therefore, with respect to proposed policies and regulations under the *Drainage Act* should be made available for comment through the Environmental Registry System as recommended by the Task Force.

The debate about the protection of Ontario's wetlands and the impact of the *Drainage Act* should be discussed by interested groups. This discussion could be greatly facilitated by the use of the public participation regime recommended by the Task Force.

(F) Considerations for the Public

The preamble to the Environmental Bill of Rights states that Government shares responsibility for protecting the environment with individual members of the public. Each has a role to play. It should be clear from the Task Force's recommendations that government will meet its share of the responsibility to protect the environment and public resources if the public is vigilant and involved in environmental decision-making. The Task Force has recommended a system that provides an open or "transparent" system for environmental decision-making. This transparency is to facilitate the timely and informed participation of the public in these decisions. Residents of Ontario who are concerned about our environment must take the time to familiarize themselves with the Environmental Bill of Rights and the new rights and responsibilities that it creates.

Conclusions

As mentioned at the outset of this chapter, the above sectors are not the only groups who will have a special interest in the proposed Environmental Bill of Rights. During the period of public comment that follows release of this Report and the proposed Bill, other "special considerations" will no doubt emerge and will require additional thought. The Task Force urges any such group or sector to consider the purposes of the Environmental Bill of Rights and their possible application to them. Environmental decision-making affects many aspects of Ontario's society. The Task Force hopes the conceptual framework proposed by it has sufficient flexibility to accommodate these many varied interests.

Chapter 5

Dealing With Transition: Phasing in The Environmental Bill of Rights and Reviewing its Implementation

The Task Force began its work with a recognition that while the public and the government share responsibility for protection of the environment, government has the primary responsibility for protection of the environment and public resources. As explained in previous sections, the Task Force then set out in search of ways to ensure government accountability for that responsibility. Once the approach was settled upon, and the Task Force developed a conceptual framework, it became apparent that an Environmental Bill of Rights for Ontario cannot be brought into force in its entirety overnight. A transition will be required in a variety of ways and for a variety of reasons. In addition, and in large part because of the need for a transition, a review of the effectiveness of the implementation will be necessary.

(A) The Reasons for a Transition

A transition to full application of an Environmental Bill of Rights as recommended by the Task Force will be required for several reasons. The Task Force is aware that its recommendations, particularly with respect to the public participation regime and access to courts, will have a profound effect on environmental decision-making. In making its recommendations, the Task Force was aware of the following considerations:

- **Financial Resource Considerations**

  Financial resources within government are a scarce commodity. There will be costs associated with a conversion to the system recommended by the Task Force. In particular the establishment of the Registry, the classification system, and the formalized Applications for Reviews and Investigations, will require not just thought and work by government officials, they will also require financial resources. The Task Force was mindful of this as it prepared its recommendations and was careful to provide that its recommendations were realistic and affordable by the province, given the current economic climate. The Task Force was also aware of the fact that if its recommendations were perceived to be unaffordable then there would be a risk that none of them would be implemented. A gradual implementation of Task Force recommendations over time is reasonable in such circumstances.

- **Human Resource Considerations**

  The amount of work within government that will be required to convert the process of environmental decision-making process to the regime recommended by the Task Force will take time. The goal of the public participation regime is to create a uniform, predictable and certain method of environmental decision-making. This can be achieved, ministry by ministry, over time. Some ministries are more likely candidates for immediate implementation of the public participation regime than others. There is no reason to wait for all ministries to be ready to join the regime in order to begin using it. However, the Task Force accepts the fact that the volume of work necessitated by the conversion to the new public participation regime calls for a phase-in of its application. This, again, is reasonable in the circumstances.

- **Refining The System Throughout Transition**

  The Task Force also understands that as the conversion to the new system begins, new and perhaps better ways of achieving the goals of public participation will be discovered. A transition to the new system of environmental decision-making should allow those who are implementing the system to learn as they implement and to incorporate refinements over the course of the transition. The Task Force recommends that the transition period be used to maximum advantage in this regard.

- **Learning From Other Groups**

  During the course of its work the Task Force had exchanges with both the Round Table on the Environment and the Economy and the Commission on Planning and Development Reform in Ontario. These and other environmental advisory committees that are providing advice to government will be reporting over the next two or three years. Those officials who will be responsible for the implementation of the Environmental Bill of Rights should, as a result of the transition, be able to integrate where applicable, the recommendations of those advisory committees and commissions. The Task Force believes that this is a reasonable approach and that the transition period should be used to ensure an effective implementation of the Environmental Bill of Rights along with complementary recommendations from other groups.

- **Integration**

  The Environmental Bill of Rights as recommended by the Task Force does not replace in its entirety all environmental law currently in place in the Province of Ontario. It is being added to an already extensive body of environmental law. The Task Force attempted to ensure that it did not duplicate protections already in place. The Environmental Bill of Rights will require integration with existing environmental mechanisms and protections. A careful transition will facilitate this integration without disturbing environmental protections that are in place and working well, and without duplicating and interfering with processes in place. The Task Force is of the opinion that transition will offer a worthwhile opportunity to ensure effective integration with existing environmental and other laws of the province.

The Task Force recommends that the establishment of an implementation team with representatives of other affected ministries to ensure an effective transition to full integration of the Environmental Bill of Rights. This implementation team should consult with the Environmental Commissioner.

(B) The Method of Transition

The Task Force contemplates that the transition will take a number of forms:

- **Royal Assent to Proclamation**

  Assuming the Environmental Bill of Rights eventually proceeds through the legislative process and receives Third Reading and Royal Assent, the Task Force foresees allowing a reasonable period of time between Royal Assent and proclamation to enable those Ministries affected by the reforms to prepare for them. The work needed to achieve implementation, however, should begin immediately and not await proclamation.

- **Ministry by Ministry: Phase-in**

  The public participation regime described in an earlier chapter should be phased-in ministry by ministry over the next several years between the date of proclamation and the end of this century. It is reasonable to expect the Ministry of the Environment to begin the process of conversion to the new decision-making regime, followed in turn by the Ministry of Natural Resources, the Ministry of Northern Development and Mines, the Ministry of Agriculture and Food, and others as decided by Cabinet.

- **Policies, Regulations, Instruments: Phase-in**
  Further refinements on the phase-in of the Environmental Bill of Rights could include applying the new public participation regime to the policies and regulations of some ministries before application of the regime to their instruments. In this last respect it may be possible, for example, to have the Ministry of Natural Resources using the Environmental Registry to consult the public on its policies and regulations in advance of its use of the registry for instrument issuing. In some cases individual Ministries may wish to phase-in coverage of specific instruments. The Task Force considers this approach reasonable.

- **Continuing Legal Education**
  The new cause of action for significant harm to a public resource and the change with respect to the public nuisance rule should be brought into force as quickly as possible but they may also require a period of continuing legal education for the legal profession and judiciary to ensure effective use of these new causes of action. The Task Force considers it reasonable to proclaim the provisions with respect to access to the courts immediately. Continuing legal education for the legal profession and judiciary could accompany proclamation.

- **Ministerial Discretion**
  Finally, the public participation regime contemplates the exercise of Ministerial discretion to control the volume of work through the Registry and its effective use. The Task Force considered including a mandatory requirement that all significant environmental policies be placed on the Registry. This was rejected in favour of Ministerial discretion in order to avoid overwhelming the Registry. If Ministerial discretion is abused then the transparency of the system, the Environmental Commissioner, the Ministerial responses and public opinion should lead to political accountability and possibly further reform.

In conclusion, the Task Force considers it reasonable in the circumstances to use the above methods of transition to ensure an effective phased in implementation of the Environmental Bill of Rights over time. Phase-in should not be seen as a delay or as an excuse for not implementing the reforms. Transition should be used as an opportunity to introduce smoothly and effectively a method that will profoundly change the way in which environmental decisions are made in Ontario and the way in which we protect our environment and public resources.

(C) Reviewing Implementation

The need for a phased-in transition creates in turn a need to ensure that implementation is actually achieved and achieved as quickly, as effectively [illegible] as affordably as possible. The Task Force believes this review can be accomplished in a variety of ways:

- **The Environmental Commissioner**

  The full duties and responsibilities of the Environmental Commissioner have been set out in detail (see Chapter 3(B)(ii)) but his/her role in reviewing implementation should be considered in relation to the transition.

  The Environmental Commissioner's primary responsibility is to provide oversight to implementation of the full Environmental Bill of Rights. This will include monitoring such things as:

  - the application and impact of the various Statements of Environmental Value,
  - the public's use of Applications for Investigation and Review,
  - the use of "whistleblower" protections through the Ontario Labour Relations Board,
  - individual ministry use of the Environmental Registry, the exercise of ministerial discretion and such things as emergency powers.

  The information gathered during this monitoring should be incorporated into the biennial Report of the Commissioner. The Report should provide specific comments on the progress of the implementation, its successes, its shortcomings and, if necessary, provide recommendations for improving the transition.

The Environmental Commissioner therefore has an important role to play in monitoring the transition to a fully operational Environmental Bill of Rights. His/her report should provide the objective foundation of information from which accountability should flow.

- **Statements by Ministers: Responding to the Environmental Commissioner**
  Once an Environmental Commissioner's Report is made available to the Legislature the Task Force anticipates the need for specific Ministerial responses. Whether these responses occur in the Legislature or before a Standing Committee of the Legislature can be determined by others. However Ministerial responses to the Environmental Commissioner will provide the opportunity for accountability within government.

  These responses should follow closely the actual Environmental Commissioner's Report.

The Task Force recommends that:

- ***the Environmental Bill of Rights be implemented in full over a reasonable period of time through the effective use of a phased-in transition,***
- ***the Government establish an Environmental Bill of Rights Implementation Team to ensure full implementation and effective integration of the Environmental Bill of Rights into Ontario's existing laws and planned reforms,***
- ***the monitoring of the implementation of the Environmental Bill of Rights by the Environmental Commissioner and specific comments in his/her biennial Report about the progress of implementation,***
- ***Ministers affected by the Environmental Bill of Rights respond to the Environmental Commissioner's Report once it is delivered to the Legislature and account for their progress in implementation.***

APPENDICES
REPORT OF THE TASK FORCE ON THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS

I Statement to the Ontario Legislature by the Honourable Ruth Grier, and Press Release: "New Task Force to Produce Draft Environmental Bill of Rights", October 1, 1991, Ministry of the Environment 188

II Class Proceedings Backgrounder and Press Release, December 17, 1990, Ministry of the Attorney General 192

III Intervenor Funding Press Release, "Extension of *Intervenor Funding Project Act* Announced", March 25, 1992, Ministry of the Attorney General 200

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THE HONOURABLE RUTH GRIER
MINISTER OF THE ENVIRONMENT

STATEMENT TO THE ONTARIO LEGISLATURE

ANNOUNCING

THE MINISTER'S TASK FORCE ON THE ONTARIO ENVIRONMENTAL BILL OF RIGHTS

OCTOBER 1, 1991

Mr. Speaker:

I wish to take this opportunity to advise the members of the Legislature about the progress of the Environmental Bill of Rights and the next stage in its development.

My commitment to this bill has long been a matter of record in the Legislature. Our goal is simple but it is of profound importance: to give the citizens of Ontario the right to act to protect the environment.

I am pleased to advise the Legislature today that I have now established the Minister's Task Force on the Ontario Environmental Bill of Rights.

This task force is made of up of representatives from business, environmental groups and government. The members will draw upon their expertise and experience to design a draft bill.

The task force is co-chaired by my deputy minister, Gary Posen, and Michael Cochrane, a senior counsel with the Ministry of the Attorney General. The members of the task force are:

- Bob Anderson, Business Council on National Issues
- George Howse, Canadian Manufacturers' Association
- Rick Lindgren, Canadian Environmental Law Association
- John Macnamara, Ontario Chamber of Commerce
- Sally Marin, Ministry of the Environment
- Paul Muldoon, Pollution Probe
- Andrew Roman, law firm of Miller Thompson

Co-chair Michael Cochrane will also meet directly with groups who have a special interest in the proposed bill, such as the Ontario Federation of Labour, the Ontario Federation of Agriculture and the Canadian Bar Association.

Mr. Speaker, I believe this is a balanced and thorough way to proceed in the development of this bill. Because the bill is closely related to many other pieces of provincial legislation, it requires a detailed and careful drafting of its provisions and a complete understanding of its implications.

Everyone on this task force has agreed to work within the framework of some principles which I have indicated are fundamental to this bill. These include:

- the public's right to a healthy environment;
- the enforcement of this right through improved access to the courts and/or tribunals, including an enhanced right to sue polluters;
- increased public participation in environmental decision-making by government;
- increased government responsibility and accountability for the environment;
- greater protection for employees who "blow the whistle" on polluting employers.

Our earlier consultations -- with the public, an interministerial committee and an advisory committee of 26 organizations -- concentrated on a broad discussion of principles. The task force will focus on the specific provisions of a draft bill.

When the draft bill has been completed, there will be further opportunity for public review.

In closing, I'd like to thank the members of the task force and the members of the Legislature, whom I welcome in joining me in delivering this important reform to the citizens of Ontario.

- oOo -

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Ontario

news release

Ministry
of the
Environment

October 1, 1991

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NEW TASK FORCE TO PRODUCE DRAFT ENVIRONMENTAL BILL OF RIGHTS

A new task force has been formed to produce a draft Environmental Bill of Rights to serve as the next stage in the development of the bill, Environment Minister Ruth Grier today told the Ontario Legislature.

The Minister's Task Force on the Ontario Environmental Bill of Rights is made up of representatives from environmental groups, the business community and government.

"My commitment to this bill has long been a matter of record in the Legislature. Our goal is simple but it is of profound importance: to give the citizens of Ontario the right to act to protect the environment," Mrs. Grier said.

"The initial consultation -- with the public, an interministerial committee and an advisory committee of 26 organizations -- concentrated on a broad discussion of principles. The task force will now focus on the specific provisions of a draft bill," she said.

The Minister's Task Force on the Ontario Environmental Bill of Rights is co-chaired by Deputy Minister Gary Posen, Ministry of the Environment, and Michael Cochrane, a senior counsel with the Ministry of the Attorney General. Members are:

- Bob Anderson, Business Council on National Issues
- George Howse, Canadian Manufacturers' Association
- Rick Lindgren, Canadian Environmental Law Association

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- John Macnamara, Ontario Chamber of Commerce
- Sally Marin, Ministry of the Environment
- Paul Muldoon, Pollution Probe
- Andrew Roman, law firm of Miller Thompson

Co-chair Michael Cochrane will also meet directly with groups that have a special interest in the proposed bill, such as the Ontario Federation of Labour, the Ontario Federation of Agriculture and the Canadian Bar Association.

When the draft bill has been completed, there will be further opportunity for public review.

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Appendix II

CLASS PROCEEDINGS IN ONTARIO

Backgrounder

Ministry of the Attorney General

CLASS PROCEEDINGS REFORM

Attorney General Ian Scott introduced for First Reading the *Class Proceedings Act, 1990*, which will make available a comprehensive procedure for claims on behalf of numerous persons who have suffered the same loss or injury. The procedure is designed to provide a more efficient and streamlined method for the court to deal with complex litigation affecting the interests of hundreds or even thousands of persons.

BACKGROUND

On June 29, 1989, the Attorney General announced in the Legislature the Government's intention to undertake class action reform.

Formation of Committee

He also announced the formation of the Attorney General's Advisory Committee on Class Action Reform which was to be made up of representatives of business interests, consumers, lawyers and environmentalists. Committee members were:

Canadian Manufacturers' Association
Canadian Federation of Independent Business
Retail Council of Canada
Consumers' Association of Canada
Energy Probe
Canadian Environmental Law Association
Insurance Bureau of Canada
Advocates' Society
Ontario Chamber of Commerce
Canadian Bar Association of Ontario.

Terms of Reference

The Committee's terms of reference required that it design the legal infrastructure of a class action for Ontario within the following parameters:

1. The consultations would start from the premise that the class action remedy would treat plaintiffs and defendants in a fair and equitable manner, and would impose no unnecessary burdens on the courts.

2. The remedy would include a structured certification procedure in which a judge would screen potential class actions according to specific tests.

3. A rule that all class members who do not specifically opt out would be included in the action.

4. A presumption that notice would be given to class members following certification, unless otherwise ordered by the court, would be included.

5. There would be a controlled contingency fee arrangement.

6. There would be no special role for the Attorney General in class actions.

7. Undistributed awards would be returned to the defendant following the expiry of the relevant limitation period except with respect to environmental cases which would be given further consideration by the Advisory Committee.

8. The new class action remedy would apply in all types of claims and that balanced court rules and procedures should apply to this unique remedy. In particular, it would be applicable in environmental litigation and in consumer litigation.

9. The Ministries of the Environment and Consumer and Commercial Relations, which have been considering introducing class action remedies in their legislation, would contribute their expertise, but would leave the creation of a class action remedy to the Attorney General's consultation process while its work was ongoing.

The Committee delivered a unanimous report to the Attorney General in February of 1990 recommending a specific design for the procedure and its method of delivery to litigants, the courts and the public.

The Committee has approved the *Class Proceedings Act, 1990,* as introduced today as being consistent with its Report to the Attorney General.

The Push for Class Proceedings Reform

The impetus for reform of this area has come from a number of sources:

- The Supreme Court of Canada in *General Motors v Naken* (1982) noted the inadequacy of the existing Rule 12 (then R.75) for meaningful class actions. The existing rule does not provide the court with sufficient guidance for managing complex litigation.

- The Ontario Law Reform Commission published its "Report on Class Actions" in 1982 which recommended a new comprehensive procedure.

- The Ministry of the Attorney General hosted the "Access to Justice" Conference in June of 1988 in Toronto. Participants called for a new class action procedure as a way of increasing access to the justice system.

- The Uniform Law Conference of Canada at its August, 1988 meeting in Toronto also approved in principle class action reform along certain specific lines.

- In January of 1989 the Alberta Committee on Fair Dealing in Consumer Savings and Investments published its Report entitled, "A Blueprint for Fairness". The Committee recommended that consumers have a civil right of action on a class basis, allowing government to participate, where consumers suffer losses due to breach of the proposed "Consumer Savings and Investment Information Act".

- Quebec has had class actions available to litigants for over a decade.

- The United States has had class actions available to litigants at both the state and federal level for over twenty five years.

THE CLASS PROCEEDINGS ACT, 1990

The bill proposes the following procedure:

- Class proceedings may be initiated in three ways:
  - a person may commence a proceeding on behalf of a class
  - a defendant may ask that two or more lawsuits against it be classed in to one
  - any party to lawsuits against defendants may ask that the defendants be classed together to defend as a group.
- The court will only order the parties into a class if the claim meets a test provided in the Act.
- The test requires that there be:
  - a cause of action
  - an identifiable class
  - common issues
  - that the procedure be the preferable way of resolving the issues
  - that there be a representative for the class who will fairly and adequately represent the class in the litigation.
- If a person does not wish to be in the class proceeding they may exclude themselves (opt out), otherwise they will be presumed to participate in the claim.
- The representative for the class must ensure that class members obtain notice of the proceeding.
- The court has wide powers to control the proceeding and ensure it is conducted fairly and expeditiously.
- Special provision has been made for the use of statistical and sampling evidence.
- The court will have the power in certain circumstances to give aggregate judgments without proof from individual class members.
- The court will have wide discretion in providing for distribution of judgments.
- All settlements, abandonments and discontinuances of class proceedings are subject to court approval.

- All fees and disbursement arrangements between lawyers and representatives are subject to approval by the court.
- Lawyers will be permitted to take class proceedings on contingency of success with respect to their fee. A method of calculating such a fee has been provided for the court.
- Complementary amendments to the *Law Society Act* will permit the Law Foundation of Ontario to endow a separate account to be known as the Class Proceedings Fund.
- The account will receive over two years $500,000 from the Law Foundation.
- Representative plaintiffs can apply to the Fund for financial assistance with disbursements, the cost of notice to the class and experts' reports. The Fund will also indemnify the representative plaintiff for adverse costs awards.
- The Cost Proceedings Fund will be evaluated over a three year period.

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Ontario

NEWS RELEASE
COMMUNIQUÉ

Ministry of the Attorney General
Ministère du Procureur général

CLASS PROCEEDINGS ACT INTRODUCED BY ATTORNEY GENERAL

DECEMBER 17, 1990

TORONTO -- Attorney General Howard Hampton introduced legislation today which will support the government's plans to develop an environmental bill of rights and provide another important avenue of access to justice in Ontario. An advisory committee on the law of Standing has also been created to examine the basis on which individuals have access to the courts when raising important issues of public interest.

The Class Proceedings Act, 1990, which adopts the consensus model developed by an advisory committee and which was introduced in the legislature by the previous provincial government, will allow numerous individuals who have suffered a common wrong to seek redress in one law suit.

"I am pleased to introduce this legislation because it forms an important part of this government's larger strategy, to provide a procedure to assist in redressing environmental loss, among other types of widespread harm or injury," said Mr. Hampton.

"The advisory committee on the law of Standing will also provide valuable recommendations on increasing access to the courts," added Mr. Hampton. "The membership of the committee is representative of the primary interests that would be affected by a reformed law of Standing." Committee members include the Canadian Manufacturers' Association, Canadian Bar Association-Ontario, Canadian Environmental Law Association and the Legal Education Action Fund.

The committee is being chaired by Ann Merritt, Counsel, Policy Development Division of the Ministry of the Attorney General, and will begin meeting this week.

The Class Proceedings Act, 1990 is designed to treat plaintiffs and defendants in a fair and equitable manner, without imposing unnecessary burdens on the courts. The highlights of The Class Proceedings Act, 1990 are:

* The class proceeding will include a step in which a judge will screen or certify potential class proceedings according to a specific test;

(over)

- Members of the class who do not wish to participate in the class proceedings will have the opportunity to exclude themselves, or opt out, of the proceeding;
- The representative plaintiff will be required to ensure that the class members obtain notice of the proceeding;
- Once certified by the court the proceeding would continue in a manner similar to other civil litigation, but with some significant differences, namely: one judge will hear all motions up to the trial; the court will have the ability to make aggregate judgments in cases where the only issue is the assessment of damages for many individuals; and, the court will have flexibility in the method by which a judgment can be distributed to class members.
- Plaintiffs will be able to enter into special fee arrangements with their lawyers, including modified contingency fees which will be subject to the supervision of the court.

Through complementary amendments to the Law Society Act, the Law Foundation of Ontario will endow a Class Proceedings Fund in the amount of $500,000. The Fund will be used to assist plaintiffs in class proceedings with disbursements and costs awards.

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CONTACTS:

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Ontario

NEWS RELEASE
COMMUNIQUÉ

Appendix III

Ministry of
the Attorney
General

Ministère
du Procureur
général

EXTENSION OF INTERVENOR FUNDING PROJECT ACT ANNOUNCED

MARCH 25, 1992

TORONTO -- Attorney General Howard Hampton, Environment Minister Ruth Grier and Energy Minister (Acting) Brian Charlton announced today that a pilot project established to provide funding to public interest intervenors has been continued.

"The Government of Ontario is pleased to be able to extend the Intervenor Funding Project for four years. The project has played an important role in increasing public access to administrative tribunals and ensuring public input in the decision making process," said Mr. Hampton.

The Intervenor Funding Project Act was proclaimed on April 1, 1989 as a three-year pilot project. Under this Act, organizations likely to benefit financially from a decision by the Environmental Assessment Board or the Ontario Energy Board provide funding to public interest intervenors at hearings.

"The Intervenor Funding Project Act has been valuable in ensuring that environmental concerns are fairly represented at Environmental Assessment Board hearings," said Environment Minister Ruth Grier. "Requiring project proponents to provide funds needed by public interest intervenors has been a real improvement over the previous ad hoc process of the provincial government granting such funds."

Over the past three years, the Act has provided groups with the financial means to present their cases to boards reviewing such proposals as municipal landfills, electric power generation and changes in gas utility rates.

The decision to continue the legislation was made after completion of an independent evaluation of the Act. This evaluation, a joint effort by the Ministry of the Attorney General, the Ministry of the Environment and the Ministry of Energy, was carried out by a consulting team headed by Professors W.A. Bogart and Marcia Valiante, both of the Faculty of Law of the University of Windsor. The evaluation report shows broad support for the objectives of the legislation. The report is being printed and will be available early this spring.

The continuation of the legislation will allow time for the government to review and consider the recommendations contained in the evaluation report. After consultation, the government will develop proposals for permanent legislation. It is hoped that new legislation will be tabled and passed well before the end of the four-year extension.

-30-

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A GLOSSARY OF SOME COMMON TERMS AND EXPRESSIONS

"abatement" refers to methods to mitigate the contamination or degradation a particular activity may be having on the environment. Often, abatement measures are voluntarily adopted or the ministry, through the imposition of an administrative order, may compel a person to institute specific abatement measures in order to lessen the undertaking's impact on the environment.

"Alternative Dispute Resolution (ADR)" refers to a set of dispute resolution mechanisms other than traditional adversarial means such as a court of law. It should be viewed collectively as a variety of voluntary, interactive approaches that allow disputing parties to meet face to face in an effort to reach a mutually acceptable resolution. ADR includes negotiation, mediation, arbitration, and other similar forms of dispute resolution. Often, ADR may also be employed as a way of scoping the issues prior to an adversarial hearing.

"air" means open air not enclosed in a building, structure, machine, chimney, stack or flue.

"Class Environmental Assessment (Class EA)" refers to a process that applies the Environmental Assessment Act to projects that are similar in nature, occur frequently, are limited in scale and have only minor and generally predictable effects on the environment. The Ministry of the Environment felt that compelling the proponent to meet the requirements of the EAA for such undertakings would be too onerous. Therefore, such projects are grouped together into a class EA process, so that each process is not individually subject to the requirements of the Act. The Class EA process starts with the production of a parent class EA document that describes a procedure for planning and implementing projects within the class. That document is approved through the individual EA review and approval process, as a result of which the procedure is authorized. Examples of class EA's include improvements in existing water works, sewage works and highways.

"contaminant" is defined as a solid, gas, liquid, odour, heat, sound, vibration, radiation, or combination of any of these, resulting directly or indirectly from human activities, which may cause injury to humans, animals, flora, or fauna, under the Environmental Protection Act.

"discretionary hearing" means a public hearing that may be held at the discretion of the responsible Minister under a prescribed Act.

"EAA" means Environmental Assessment Act.

"EBR" means Environmental Bill of Rights.

"ecological system" means ecosystem.

"ecosystem" is a generic term for a system that includes a community of organisms and their interactions with the environment.

"environment" means the air, water, land, plant life, animal life, and ecological systems of Ontario.

"Environmental Assessment Act (EAA)" provides for the assessment of any proposed major undertaking --government, municipal or private-- at the very earliest stages so that it may be altered or even cancelled if it is found to be environmentally unacceptable. The Act also provides for public participation in the decision-making process. It is being implemented in stages, applying first to major provincial undertakings. Specific private projects which involve significant environmental effects may be designated for assessment.

"Environmental Assessment Advisory Committee (EAAC)" is a body whose purpose is to offer advice to the Minister of the Environment with respect to the operation of the Environmental Assessment Act. For instance, the Minister may ask EAAC for advice on whether a specific undertaking should be designated under the Act for approval. Currently, EAAC is in the process of finalizing a package of reforms to the EAA which are meant to streamline environmental assessment and involve the public at earlier stages of the planning process.

"environmental decision-making" are decisions which the Provincial Government makes that have, or may potentially have, a significant impact on the environment. These decisions can come in the form of regulations, policies, or instruments.

"Environmental Protection Act (EPA)" is a comprehensive regulatory scheme covering all types of pollution, forbidding the discharge of any contaminant into the natural environment in amounts, concentrations or levels exceeding those prescribed by regulation.

"Freedom of Information and Protection of Privacy Act (FOI)" was established in 1987. The purpose of this statute is to provide the public with a right of access to information that is under the control of a governmental institution. An institution is only allowed to deny access to a particular record of information if that record is protected by one of the exemptions listed in the Act. If the person applying for the information is dissatisfied with the lack of disclosure, he/she may appeal an institution's decision to the Information and Privacy Commissioner.

"groundwater" is water occurring below the soil surface, and that is held in the soil itself; subsurface water, that is, water stored in the pores, cracks, and crevices in the ground below the water table; water occurring in the zone of saturation below the earth's surface.

"instrument" means any document of legal effect issued under an Act and includes a permit, license, approval, authorization, direction, or order issued under a prescribed Act, but does not include a regulation.

"land" includes wetland and land covered by water but does not include land enclosed in a building;

"Municipal/Industrial Strategy for Abatement (MISA)" was started in 1986. Its goal is the virtual elimination of toxic contaminants in municipal and industrial discharges into the Province's waterways. The programme targets ten sectors and is comprised of two phases. In the first phase which was recently completed, effluent monitoring regulations were developed which required dischargers to monitor their effluent at their source-point at regular intervals. The goal of the second phase is to develop and implement effluent limits for each of the nine industrial and municipal sectors, on a sector-by-sector basis, using data collected during the monitoring phase. These limits are to be based on the "best available technology economically achievable".

"natural resources" means resources.

"Ontario Water Resources Act (OWRA)": is an Act which gives the Ontario Ministry of the Environment extensive powers to regulate water supply, sewage disposal and the control of water pollution. Under the Act, any discharge into a body of water, on its shore or in any place that may impair the quality of the water, is an offence.

"Pesticides Act" is an Act which restricts the storage, distribution, sale and use of pesticides. The Ministry of the Environment examines and licenses professional exterminators and maintains a classification system to ensure that hazardous chemical pesticides are not handled or used by unqualified persons.

"policy" is any major program, plan, objective, or guideline of government.

"prescribed" means set out in the regulations under the proposed Environmental Bill of Rights.

"public nuisance" is an inconvenience or interference caused to the public generally, or part of the public, which does not affect the interests of individuals in land. Unlike private nuisance, public nuisance was originally a crime and was only actionable at the will of the Attorney General. Eventually, it was recognized by the courts as a civil wrong for which a person could recover damages.

"public nuisance rule" is a rule which prevents persons from bringing an action to court in public nuisance unless they receive consent from the Attorney General to proceed, or unless they could demonstrate that they suffered a harm that distinguishes them in kind or degree from the rest of the affected community.

"water" means any body of water including rivers, lakes, streams, and groundwater.

"wetland" means land, that is,

(a) seasonally or permanently covered by shallow water, or

(b) in respect of which the water table is close to or at the surface,

so that the presence of abundant water has caused the formation of hydric soils and has favoured the dominance of either hydrophytic or water tolerant plants.

"whistleblowing" is the act of an employee reporting to the Ministry of Environment or other ministries, a breach or an anticipated breach of an environmental law in the workplace.

APPENDIX V

A SUMMARY OF RECOMMENDATIONS

Chapter 3(A)
Introduction: Preamble, Purposes and Environmental Values

The Task Force recommends that:

1 The preamble to the Environmental Bill of Rights acknowledge that the public and government must strive individually and collectively to achieve the common goal of protecting our natural environment but that government has the primary role. (preamble)

2 Environment be defined to mean the air, water, land, plant life, animal life and ecological systems of Ontario, and that

  - *"air" be defined to mean open air, not enclosed in a building, structure, machine, chimney, stack or flue,*
  - *"land" be defined as including wetland and land covered by water but not land enclosed in a building,*
  - *"water" be defined to include ground water. (s.1)*

3 The purposes of the Environmental Bill of Rights be:

  - *to protect, conserve and, where reasonable, restore the integrity of the environment; (s.2(1)(a))*
  - *to provide sustainability of the environment for the benefit of present and future generations; (s.2(1)(b))*
  - *to protect the right of present and future generations to a healthful environment; (s.2(1)(a))*
  - *the prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment; (s.2(2)1)*
  - *the protection and conservation of biological, ecological and genetic diversity; (s.2(2)2)*
  - *the protection and conservation of natural resources, including plant life, animal life and ecological systems;(s.2(2)3)*
  - *the encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems; (s.2(2)4) and*
  - *the identification, protection and conservation of ecologically sensitive areas or processes. (s.2(2)5)*

4 *The purposes of the Environmental Bill of Rights be achieved through four primary methods:*
   - *(a) providing the means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;*
   - *(b) providing increased accountability of the Government of Ontario for its environmental decision-making;*
   - *(c) increasing access to the courts by residents of Ontario for protection of the environment; and*
   - *(d) enhancing the protection for employees who take action in respect of environmental harm. (s.2(3)(a) to (d))*

5 *Each Ministry in the government of Ontario that makes decisions that affect or may affect the environment should develop a Statement of Environmental Values. (s.5)*

6 *The Statement of Environmental Values be developed in consultation with the public. (s.6)*

7 *The Statement of Environmental Values be a concise statement of the integration of the purposes of the Environmental Bill of Rights with the social, economic, scientific and other considerations already being applied by that ministry in environmental decision-making. (s.5(a) & (b))*

8 *The Statements of Environmental Values be used by the Ministries to guide future environmental decision-making. (s.9)*

9 *The Statements of Environmental Values be developed as soon as possible.*

Chapter 3(B)(i)
The Environmental Registry System

The Task Force recommends that:

10 *The government establish an Environmental Registry System for significant environmental decisions being made by government. (s.10)*

11 *It be used by all Ministries which make significant environmental decisions and be phased in to apply to Ministry of the Environment, Ministry of Natural Resources, Ministry of Northern Development & Mines, Ministry of Agriculture and Food, and others as determined by Cabinet.*

12 *The Environmental Registry System be used to provide the public with notice of proposed policies, regulations and instruments that may have a significant effect on the environment and with timely opportunity to comment on the proposal. (s.11)*

13 *The Environmental Registry System provide notice of the decision made with respect to the proposal after the public has had an opportunity to comment. (s.11)*

14 Significant proposed policies, regulations and instruments be handled through the Environmental Registry System in three separate components - a Policy Component, a Regulation Component and an Instrument Component.

15 Each component of the Environmental Registry System establish rules for providing minimum levels of notice (30 days) and timely opportunities to comment, as well as notice of the decision made. (s.76(1)(i) to (l))

16 The Environmental Registry System apply to proposals for policies, regulations and instruments made after the Environmental Bill of Rights is in force. (ss.13, 14, 15) It should not be used to record decisions made before the Environmental Bill of Rights comes into force.

17 The Environmental Registry System should establish the minimum standard of public consultation on a significant environmental decision and, over time, all significant environmental decision-making processes in government should meet at least that minimum standard.

18 The minimum requirements for public participation in an environmentally significant decision be notice of the proposed decision, a 30-day period for comment by the public and, where comments were received, the publication of the decision and the reasons for it.

19 Proposed policies placed on the Environmental Registry System for public comment include policies for any major program, plan, objective or guideline of the government with respect to the environment that may have a significant environmental impact and that the Minister responsible for that policy identifies as warranting public consultation. (s.13)

20 Proposed regulations placed on the Environmental Registry System for public comment should include regulations made under Acts listed in the regulations under the Environmental Bill of Rights that would have a significant environmental impact. (s.14)

21 The Minister have discretion to increase the length of notice and to establish methods of obtaining public comment for policies and regulations.

22 Proposed instruments placed on the Environmental Registry System for public comment include any document of legal effect issued under an Act and any licence, permit, approval, authorization, control order, or other legal authorization, and is made under an Act listed in the regulations made pursuant to the Environmental Bill of Rights. (s.1)

23 Significant environmental instruments be classified into four Classes (I to IV) which would reflect gradients of notice and opportunity to comment related to their significance. (s.76(1)(i) to (m))

24 The Environmental Registry System permit multi-media approvals, fast-track approvals and the use of alternate dispute resolution. (s.76(1)(n) & (o))

25 *The classification scheme for instruments apply over time, to all Ministries which make significant environmental decisions.*

26 *The Environmental Registry System contemplate exceptions to the requirements to consult including:*

- *emergency situations;(s.16(1)(a))*
- *situations where public consultation on a significant environmental decision has been or will be achieved through an equivalent process; (s.17) or*
- *situations where the instrument implements a decision which has been made by an independent tribunal or pursuant to the Environmental Assessment Act.(s.18)*

27 *Appeals to a tribunal by members of the public of Class I and II instruments be permitted in certain circumstances.(s.76(1)(p))*

28 *Class IV instruments be subject to review by the Divisional Court of Ontario or as otherwise provided. (s.76(1)(p))*

29 *The Environmental Registry System be designed to scope the consideration of issues at each step of public comment.*

30 *Any resident of Ontario be able to make an application to the court for a declaration that a Minister failed to comply with the Environmental Registry System requirements with respect to a proposal for an instrument within 15 days of notice of implementation of the proposal.(s.74)(2)(3))*

31 *The Environmental Registry System be implemented in a way that integrates the Freedom of Information Act.*

Chapter 3(B)(ii)
The Office of the Environmental Commissioner

The Task Force recommends that:

32 *The government establish an Office of the Environmental Commissioner of Ontario which should have responsibility for objective oversight and measurement of progress in implementing the Environmental Bill of Rights.(s.22(1))*

33 *The Office of the Environmental Commissioner be accountable directly to the Legislature and be a non-partisan appointment.(s.22(2))*

34 *The Office of the Environmental Commissioner also monitor and report on the use of the Statements of Environmental Values by various Ministries. (s.23(b)(i))*

35 *The Office of the Environmental Commissioner have responsibilities which include:*

(i) *providing the key ministries which make environmental decisions with an opportunity to obtain guidance or advice on proposed environmental policies and regulations;*

(ii) *providing ministries which make environmental decisions with guidance on the development and implementation of their individual Statements of Environmental Values;(s.23(b)(ii))*

(iii) *providing education and guidance to those same ministries and their officials in understanding how to practically implement the Statements of Environmental Values in their day-to-day decision making and how to develop self-auditing procedures with respect to environmental decisions; (s.23(a) & (c))*

(iv) *providing periodic analysis and comment about whether environmental policies, regulations and instruments are actually being infused with the Statement of Environmental Values and, if not, how to ensure that they will in future;(s.23(b)(ii))*

(v) *receiving, forwarding and monitoring the Applications for Investigation, the number of requests, their disposition, and user satisfaction with the process; (s.23(f))*

(vi) *receiving, forwarding and monitoring the Applications for Review of government action, both with respect to the review of existing policies, regulations and instruments, as well as with respect to public requests for regulation of the environment where no regulations exist; (The number and disposition of requests should be monitored, as well as user satisfaction with the process.) (s.32(f))*

(vii) *monitoring the use of the new statutory cause of action for environmental harm to a public resource; (s.23(f))*

(viii) *monitoring the use of protections for employees who report environmental harm in the workplace and the number and disposition of complaints to the Ontario Labour Relations Board; (s.23(g))*

(ix) *providing general oversight in monitoring of implementation of the Environmental Bill of Rights during phase-in transition; (s.23(a))*

(x) *monitoring individual ministry use of the Environmental Registry and the exercise of ministerial discretion in placing policies, regulations and instruments on the Registry for public comment, the exercise of emergency powers and other related decisions. (s.23(d) & (e))*

36 *The Office of the Environmental Commissioner publish biennial reports about government performance, Ministry by Ministry, with respect to the Environmental Bill of Rights. This report should provide an objective foundation from which accountability would flow. (s.24)*

37 *Judicial review of a Ministry's application of the Statement of Environmental Values should not be permitted. (s.74(1))*

Chapter 3(B)(iii)
Applications for Investigation of Environmental Harm

The Task Force recommends that:

38 *There be a standardized method by which two residents of Ontario who are 18 years of age or older and believe that a contravention of a prescribed Act regulation or instrument has occurred or will occur may bring their sworn Application for an Investigation to the attention of the appropriate Ministry or Ministries. (Part V, s.32)*

39 *The Application for Investigation of a contravention be made to the Environmental Commissioner who should forward the application to the appropriate Ministry within 30 days. (s.33)*

40 *The Environmental Commissioner should use a standardized Affidavit form that records:*

- *(a) the names and addresses of the applicants;*
- *(b) a statement of the nature of the alleged contravention;*
- *(c) the names and addresses of each person alleged to have been involved in the commission of the contravention, to the extent that this information is available to the applicants;*
- *(d) a summary of the evidence supporting the allegations of the applicants;*
- *(e) the names and addresses of witnesses to the alleged contravention, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;*
- *(f) a copy of any document and and a description of any material that the applicants believe should be considered in the investigation; and*
- *(g) details of any previous contacts with the Office of the Environmental Commissioner or any Ministry regarding the alleged contravention. (s.32(2))*

41 *A Minister who receives an Application for Investigation of a contravention from the Environmental Commissioner acknowledge receipt within 30 days to the applicants. (s.34)*

42 *A Minister investigate all Applications for Investigation of a contravention unless:*

- (a) *the application is frivolous or vexatious,*
- (b) *the alleged contravention is not serious enough to warrant an investigation, or*
- (c) *the alleged contravention is not likely to cause harm to the environment.(s.35)*

43 *Where a Minister decides not to investigate he/she advise the applicants, the person alleged to have committed the contravention, and the Environmental Commissioner within 120 days of the Minister's receipt of the Application for Investigation of contravention.(s.36(1)(2))*

44 *Where the Minister investigates the Application for Investigation of contravention he/she complete the investigation within 6 months of receipt or such other time as he/she advises the applicants in writing. (s.37(1)(2))*

45 *Within 30 days of completing an investigation the Ministry advise the applicants, those alleged to have committed the contravention and the Environmental Commissioner, of the outcome, steps taken or steps intended to be taken. (s.38)*

46 *The Environmental Commissioner be prepared to assist residents with the completion of the standardized form to ensure accurate allegations with respect to prescribed Acts and other aspects of alleged contraventions.*

Chapter 3(B)(iv)
Applications for Review of Policies, Regulations and Instruments

The Task Force recommends that:

47 *There be a standardized method by which any two residents of Ontario who are eighteen years of age or older who believe that an existing policy, Act, regulation or instrument should be amended, replaced, repealed or revoked in order to protect the environment be able to apply to the Environmental Commissioner for a review of that policy, Act, regulation or instrument by the appropriate Minister.*

48 *Any two residents of Ontario who are eighteen years of age or older and who believe that a new policy, Act, regulation or instrument should be adopted, passed, made or issued in order to protect the environment, be able to apply to the Environmental Commissioner for a review of the need for a new policy, Act, regulation or instrument by the appropriate Minister. (s.25(2))*

49 *The Environmental Commissioner supply a standardized form that enables the applicants to provide the following information:*

- (a) *their names and addresses,*
- (b) *an explanation of why the applicants believe the review applied for should be undertaken in order to protect the environment; and*

(c) a summary of any scientific or evidence supporting the applicants' belief that the review applied for should be undertaken in order to protect the environment (s.25(3)).

50 The form provided by the Environmental Commissioner also clearly identify the policy, Act, regulation or instrument in respect of which the review is sought (s.25(4)).

51 The Environmental Commissioner, within 30 days, refer the application for review to the Minister(s) responsible for the matters raised in the application (s.26).

52 The Minister who receives an application for review from the Environmental Commissioner acknowledge receipt of the application directly to the applicants within 30 days of receiving the application from the Environmental Commissioner. (s.27)

53 The Minister consider applications in a preliminary way to determine whether the public interest warrants the review. (s.28)

54 In determining whether the public interest warrants a review, the Minister consider the public interest in not disturbing a decision made in the five years preceding the date of the application if the decision was made in accordance with the Environmental Bill of Rights or a substantially equivalent process. (s.28(2))

55 In determining whether the public interest warrants a review the Minister consider:

(a) the Ministry Statement of Environmental Values;

(b) any social, economic or scientific evidence that the Minister considers relevant;

(c) the potential for harm to the environment if the review applied for is not undertaken; and

(d) any other matter that the Minister considers relevant.(s. 28(3)).

56 When considering the public interest with respect to the review of an existing policy, Act, regulation or instrument, the Minister also consider:

(a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and

(b) how recently the policy, Act, regulation or instrument was made, passed, or issued. (s.28(4))

57 The Minister should inform the applicants, the Environmental Commissioner and any other person the Minister considers ought to get notice in writing within 120 days of receiving the application if he/she does not intend to conduct the review (s.29).

58 Within 30 days of completing a review, the Minister should give the applicants written notice of the outcome of the review. This notice should include a statement of what steps, if any, the Minister has taken or proposes to take as a result of the review (s.30).

59 The notice of completion of the review be sent to the Environmental Commissioner. (s.30)

60 The Environmental Commissioner exercise the same functions and duties with respect to applications for review as with respect to applications for investigation of contraventions. These duties should include monitoring the number of applications for review, their disposition and the exercise of ministerial discretion with respect to the undertaking of a review. (s.23(f))

61 Ministers who receive numerous applications for review be able to prioritize their review of any existing policies, regulations and instruments.

62 If requested by the public, existing guidelines used to issue significant environmental instruments could be placed on the Environmental Registry for an opportunity to obtain public comment an to determine the form and content of such guidelines. Guidelines that can be in the form of regulations should be converted into regulations wherever reasonable.

Chapter 3(C)
Access to the Courts for Protection of the Environment: Public Nuisance

The Task Force recommends that:

63 No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment should be barred from bringing an action in respect of the loss only because the person has suffered or may suffer a direct economic loss or direct personal injury of the same kind or to the same degree as other persons. (s.58)

64 The reform, once implemented, be monitored closely to evaluate its effect on access to justice for environmental claims. Further reform of the law of standing and public nuisance should await the outcome of that analysis.

65 The Attorney General's permission no longer be required for public nuisance claims arising from environmental harm to enter the justice system.

Chapter 3(C)
Access to the Courts for Protection of the Environment: New Statutory Cause of Action for Public Resource Protection

The Task Force recommends that:

66 *A new statutory cause of action for the protection of public resources from significant environmental harm be created. (s.41)*

67 *Any resident of Ontario be able to commence such a proceeding where significant environmental harm to a public resource is occurring as a result of non-compliance with an Act, regulation or instrument prescribed in the Environmental Bill of Rights, or where such harm is imminent. (s.41)*

68 *A pre-condition to such an action by a resident be an Application for an Investigation of the alleged contravention by the resident and an unreasonable or untimely response by the government. (s.41(2))*

69 *There be an exception for emergency situations where significant harm or serious risk of harm to a public resource may occur. (s.41(4))*

70 *The cause of action not be retroactive and apply only in respect of harm resulting from contraventions occurring after the Act comes into force. (s.40)*

71 *The onus of proof be on the plaintiff and be on a balance of probabilities. (s.41(6))*

72 *In addition to any other common law defences, a defendant have available the defences of compliance with the Act, regulation or instrument, due diligence and reasonable interpretation of the instrument in question. (s.42)*

73 *The Attorney General be served with the Statement of Claim, and should have all the rights of a party in the action. (s.43)*

74 *Notice of the action be ordered by the court and placed on the Environmental Registry. (s.44(1))*

75 *The procedure provide for notice to the public to enable the court to provide fair and adequate representation of the private and public interests at stake and their participation. (s.45)*

76 *The court have the power to stay or dismiss an action where to do so would be in the public interest having regard to environmental, economic and social concerns. (s.47(1) & (2))*

77 *When considering a stay or dismissal, the courts consider whether the issues raised in the proceeding would be better resolved in another process or whether there is an adequate government plan to address the public interest issues. (s.47(2))*

78 *The court have the power to order an injunction, the negotiation of a plan to restore the public resource, declaratory relief, and costs. (s.49(1))*

79 *A restoration plan in respect of harm to a public resource from a contravention, may provide for, to the extent that to do so is reasonable, practical and ecologically sound:*

(a) *the prevention, diminution or elimination of the harm;*

(b) *the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource; and*

(c) *the restoration of all uses, including enjoyment, of the public resource affected by the contravention. (s.51(2))*

80 *Where a defendant concurs, the court order may include research into and development of technologies to prevent, decrease or eliminate harm to the environment; community, education or health programs; and the transfer of property by the defendant so that the property becomes a public resource. (s.51(3))*

81 *A restoration plan, where appropriate, contemplate monitoring of its progress, and the need to "fine tune" it over time. (s.51(5))*

82 *A restoration plan include a provision for the payment of money only where the Attorney General and defendant consent, and in such a case the money should be paid to the Treasurer of Ontario and used only for restoration of the public resource. (s.51(7))*

83 *The court have the power to make ancillary orders to facilitate creation of the negotiation process and plan. (s.52)*

84 *The court approve any negotiated restoration plan in order to protect the public interest. (s.53(1))*

85 *The court have the power to develop a restoration plan where the parties cannot agree to a plan. (s.54)*

86 *Res judicata and issue estoppel should apply to this cause of action. (s.55)*

87 *The court have discretion with respect to costs and when exercising its discretion should consider special circumstances such as whether the action is a test case or raised a novel point. (s.56)*

88 *The delivery of a notice of appeal should not stay the operation of an order unless the appeal court grants a stay, on terms, if necessary. (s.57)*

89 *The new cause of action be subject to a two-year limitation period.*

90 *The new cause of action not be subject to an ultimate limitation period.*

91 *The action be integrated, if possible, with the Attorney General's proposed General Limitations Act.*

92 *The bench and bar and government officials receive education about the new cause of action and its operation.*

93 *The Environmental Commissioner, as a part of his/her duties, monitor the new cause of action and, in particular, its relationship to the Application for Investigation. (s.23(d) & (e))*

Chapter 3(D)
Increased Security for Workers who Report Environmental Harm

The Task Force recommends that:

94 *The protection contained in section 174 of the Environmental Protection Act, RSO, 1990, be extended to the list of environmental Acts prescribed by the Environmental Bill of Rights. (Part VII)*

95 *The activities of employees that may be undertaken and protected from dismissal, discipline, penalty, coercion, and so on, include activities now proposed in the Environmental Bill of Rights such as requesting a review of government action or requesting an investigation. (s.61(3))*

96 *The current relationship between the protection for employees who report environmental harm in the workplace and the Ontario Labour Relations Board be maintained, with the Board having the same duties and powers. (ss.62-72)*

97 *The Ontario Labour Relations Board and the Environmental Commissioner develop an administrative practice through which the Board can notify the Environmental Commissioner of complaints to the Board concerning employee reports of environmental harm in the workplace for which there was dismissal or other punitive measures taken. (s.23(g))*

98 *The Ministry of the Environment and the Ministry of Labour should consider the possibility of bringing together labour, business, government, environmentalists and other interested parties to analyze the issues of a right to refuse work that may harm the environment and the need for joint employer/employee committees in the workplace.*

Chapter 5
Dealing with Transition: Phasing in the Environmental Bill of Rights and Reviewing its Implementation

The Task Force recommends that:

99 The Environmental Bill of Rights be implemented in full over a reasonable period of time through the effective use of a phased-in transition.

100 The Government establish an Environmental Bill of Rights Implementation Team to ensure full implementation and effective integration of the Environmental Bill of Rights into Ontario's existing laws and planned reforms.

101 The monitoring of the implementation of the Environmental Bill of Rights by the Environmental Commissioner and specific comments in his/her biennial Report about the progress of implementation.

102 Ministers affected by the Environmental Bill of Rights should respond to the Environmental Commissioner's Report once it is delivered to the Legislature and account for their progress in implementation.

Acknowledgements

The unanimous recommendations contained in this report and the proposed Ontario Environmental Bill of Rights were developed because a very talented group of people came together to determine whether a broadly-based consensus on the legislative framework of an Environmental Bill of Rights could be developed. Representatives of business, government and the environmental community discussed, debated, educated and persuaded each other about their respective needs and interests in an Environmental Bill of Rights.

Their work was demanding since their obligations did not only include participating in Task Force meetings, but also involved hundreds of hours of research and discussion in order to be able to understand and evaluate the sometimes complex issues that confronted them. Each representative had a responsibility to liaise with a larger network of constituents to ensure first, that a broader base of opinion reached and influenced the Task Force's deliberations and secondly, to ensure that the Task Force consensus, as it evolved, enjoyed a wide base of support.

The following individuals participated in the Task Force on behalf of their various associations. They tackled the work with enthusiasm, thoughtfulness and a genuine interest in protecting Ontario's environment for present and future generations.

The Task Force was co-chaired by the Deputy Minister of the Environment, Gary Posen (August 1991 to May 15, 1992), Richard Dicerni (since May 15, 1992), and Michael Cochrane, a lawyer in private practice.

The following is a brief profile of each member of the Task Force:

Mr. Richard Dicerni, Co-chair (Deputy Minister of Environment)

Mr. Dicerni was appointed Deputy Minister, Environment, in May 1992. Prior to his appointment, he had been Deputy Secretary to the Cabinet, Federal Provincial Relations Office in Ottawa. He joined the Ontario government after a 20-year career with the federal government where he had held a number of senior positions including Senior Assistant Deputy Minister of Health and Welfare, and Assistant Under Secretary of State. Prior to joining the Secretary of State department in 1981, he worked as an executive officer in various federal departments as well as a ministerial aide. Mr. Dicerni has a BA from the College Ste. Marie, and a Masters in Public Administration from Harvard. He serves on the Board of Directors of ABC Canada, a foundation established to promote literacy.

Mr. Gary S. Posen, Co-chair (Deputy Minister of Environment from October 5, 1987 to May 15, 1992)

Mr. Posen was appointed Deputy Minister, Transportation, in May 1992. Prior to that he was Deputy Minister, Environment, since October 1987. He was previously Deputy Minister of the Ministry of Intergovernmental Affairs. Before his appointment in January of 1984, he was Assistant Secretary, Program Review, for Management Board. From 1978 to 1982 he was the Director of Federal-Provincial Relations Branch for the Ministry of Intergovernmental Affairs, focusing on relations with Quebec and the other regions of Canada, and on constitutional reform. He began his public service career in 1966 with the Department of Treasury and Economics. In 1971 he became Director, Federal-Provincial and Inter-provincial Affairs Secretariat, with the Ministry of Treasury, Economics and Intergovernmental Affairs. He holds a Masters degree from the University of Toronto in Political Science, and a diploma in Russian and East European studies.

Mr. Michael G. Cochrane, Co-chair

When he began as co-chair of this Task Force, Mr. Cochrane was a Senior Crown Counsel with the Ministry of the Attorney General. Called to the bar in 1980, he is currently a lawyer with the law firm of Scott & Aylen. His practice includes civil litigation and the mediation of multi-party disputes. In the past he has chaired the Attorney General's Advisory Committee on Class Action Reform and the Attorney General's Advisory Committee on Mediation in Family Law. He is the author of two texts on family law, and the author of a forthcoming text on class proceedings in Ontario. Prior to joining the Ministry of the Attorney General, he practised civil litigation for five years.

Mr. Robert Anderson (representing Business Council on National Issues)

Mr. Anderson has been General Counsel at Procter & Gamble for many years, and is a Director and is on the Management Committee of his company. He has been a Director of the Canadian Manufacturers' Association, the Ontario Chamber of Commerce and the Children's Aid Society of Metropolitan Toronto, and is currently a Director of Mission Air. He was a member of consultative groups which developed the 1986 Competition Act amendments, the Ontario Class Proceedings Act, the proposed Ontario Fair Marketplace Code and the 1991 Report on Advertising and Marketing Practices for the Competition Bureau. He was called to the Bar from Osgoode Hall in 1960, and received a Master of Laws degree from Osgoode (York) in 1976.

Mr. George Howse (representing Canadian Manufacturers' Association)

Mr. Howse joined the law department of Imperial Oil Limited in 1972 as a tax lawyer. He has held various positions with Imperial Oil including General Counsel and Tax Manager for Esso Resources Canada Limited in Calgary and General Counsel for Esso Petroleum Canada in Toronto. Currently he is Assistant General Counsel - Corporate for Imperial Oil Limited. He is a former director of the Petroleum Law Foundation and a former member of the legal Committee of the Canadian Petroleum Association. He graduated from the University of Toronto in 1963 with a BA (Honours) in Political Science and Economics. He obtained an LLB in 1966 from the University of Toronto Law School. He is a graduate of the Executive Program of the Columbia University School of Business.

Mr. Richard Lindgren (representing Canadian Environmental Law Association)

Mr. Lindgren has been a staff lawyer with the Canadian Environmental Law Association since his call to the bar. At CELA his casework and law reform activities have involved civil, criminal and administrative law, and he has represented citizens' groups in the courts and before statutory tribunals on numerous environmental issues, including wetlands, forestry, land contamination, waste disposal, and air and water pollution. He was a member of the Attorney General's Advisory Committee on Class Action Reform, and is presently a member of the Executive of the Environmental Law Section of the Canadian Bar Association (Ontario), and the Board of the Canadian Institute for Environmental Law and Policy. He teaches environmental law at Trent University and Queen's Faculty of Law.

Mr. John Macnamara (representing Ontario Chamber of Commerce)

Mr. Macnamara joined Dofasco in 1978 and has held various positions in the Commercial Department before joining the Corporate Secretarial Department in 1981. He was a member of the earlier Advisory Group on the Environmental Bill of Rights, and is a member of the Industrial Disease Standards Panel which is constituted under the Workers' Compensation Act. He graduated from McMaster University in 1973 with a B.Sc. in Biology and obtained an M.B.A. from McMaster University in 1978.

Ms Sally Marin (representing the Ministry of the Environment)

Called to the Ontario Bar in 1979, Ms Marin is counsel with the Legal Services Branch of the Ministry of the Environment, specializing in environmental prosecution policy and policy development. Prior to that, she was an Assistant Crown Attorney and later Counsel with the Constitutional Law and Policy Division of the Ministry of the Attorney General. Ms. Marin was a member of the Advisory Committee on the Environmental Bill of Rights and currently chairs the Inter-Ministerial Committee on the Environmental Bill of Rights.

Mr. Paul Muldoon (representing Pollution Probe)

Mr. Muldoon is Counsel for Pollution Probe, a charitable organization devoted to education, research, and advocacy on solutions to the environmental problems facing Canada. He assists in coordinating the organization's law and policy reform and research agendas. He has written a number of books, articles and reports pertaining to a variety of environmental problems, and in particular, toxic water pollution, biotechnology, water conservation and environmental rights. He has graduate degrees in political science and law from McMaster University and McGill University, respectively. Mr. Muldoon sits on a number of advisory committees, such as the Virtual Elimination Task Force and the Science Advisory Board of the International Joint Commission. He is also on the Board of Directors for Great Lakes United. Mr. Muldoon is a research associate with the Canadian Institute for Environmental Law and Policy.

Mr. Andrew J. Roman (as a legal consultant from the law firm of Miller Thomson)

Called to the Ontario Bar in 1973, Mr. Roman has represented and advised a wide variety of public interest groups, corporations and government departments and agencies on matters of environmental law. He has taught law as a sessional lecturer at four law schools, lectures frequently at continuing education sessions and is the author of 30 publications, including two books. He is active in the Canadian Bar Association, and is a member of the Executive of the National Administrative and Environmental Law Sections. He was also a member of the Attorney General's Advisory Committee on Class Actions and the Attorney General's Advisory Committee on Standing Reform. Mr. Roman practices administrative and environmental law with the firm of Miller Thomson.

In addition to the extraordinary contribution made to this Report and draft Environmental Bill of Rights by the individual members of the Task Force, special thanks must also be extended to the following organizations and individuals. While they were not a part of the Task Force and do not necessarily support the recommendations their comments were very valuable as the Task Force's consensus evolved.

Advocates' Society	Terry O'Sullivan, President Eleanore Cronk, 1st Vice President Len Griffiths David Roebuck Chris Paliare
Agricultural Groups Concerned About Resources and the Environment (AgCare)	Jeff Wilson, Chairman Ken Hough, Secretary
Association of Municipalities of Ontario	Noelle Boughton
Canadian Bar Association Ontario	Doug Thomson, Chairman, Environmental Law Section
Commission on Planning and Development Reform in Ontario	John Sewell, Chair George Pensold Toby Vigod
Environmental Appeal Board	John Swaigen, Chair
Ontario Federation of Agriculture	Dona Stewardson, Executive Member Dave Armitage, Policy Analyst, Policy & Research
Ontario Federation of Labour	Duncan MacDonald, Programs Coordinator Glen Buchanan, Member of the Board of Directors Linda Jolley, Director, Health & Safety Mary Morison, Coordinator, Occupational Health Clinics
Ontario Forest Industries Association	Joe Bird, President
Ontario Mining Association	Patrick Reid, President Elizabeth Gardiner
Ontario Round Table on the Environment and the Economy	Rick Findlay, Director
The Sierra Club	Gerda Potzel, Secretary
Temple Emanu-El	Rabbi Bielfeld Barbara Landau and Sy Landau

The Task Force also wishes to acknowledge the work of Mr. Norman Stewart, Vice President, General Counsel and Secretary, Ford Motor Company of Canada Limited, who helped facilitate the creation of the Task Force and who acted as an alternate for the business representatives on the Task Force. He brought a fresh perspective to the Task Force's work, along with his experience as a member of the Attorney General's Advisory Committee on Class Action Reform, the Attorney General's Advisory Committee on the Law of Standing, and the Task Force considering the development of a Fair Marketplace Code for Ontario.

In addition, the Task Force wishes to acknowledge the very thoughtful assistance of Anne Wordsworth, Policy Advisor to Ruth Grier; Steven Shrybman, Senior Policy Advisor, Cabinet Committee on Environmental Policy; and Fred Gloger, Coordinator of Environmental Policy in the Premier's Office.

Marilyn Leitman, Legislative Counsel with the Ministry of the Attorney General, worked to difficult time lines in preparing the draft Environmental Bill of Rights. Her conversion of the Task Force's wishes into legislative form was achieved efficiently, accurately and with great skill. Her analysis of the Task Force consensus led to a better draft Bill.

Special mention should also be made of the extremely able assistance provided by the Inter-Ministerial Committee on the Environmental Bill of Rights. Its members, who are described on the following pages, responded to the Task Force's needs with creativity and enthusiasm.

The staff of the Ministry of the Environment, in particular Mr. André Castel, provided both logistical support for the Task Force and advice on the Environmental Bill of Rights, deserve special credit for their assistance with our work.

In particular, the Task Force wishes to acknowledge the work of James Flagal who, while studying for a joint Masters in Environmental Studies/Bachelor of Laws Programme at York University, provided research assistance and key support for Task Force meetings. His enthusiasm for environmental law was contagious.

Little could have been accomplished without the very able work of Suzanne Theriault who, as administrative assistant and secretary to the Co-chairs of the Task Force, made certain that meetings actually took place where and when we said they should. She provided the logistical support important to undertakings such as these that involve intense discussions over a very short period of time. Her coolness under pressure was greatly appreciated.

Finally, the work of Gary Posen, Deputy Minister of Environment and Co-chair of the Task Force until his reassignment as Deputy Minister of the Ministry of Transportation, must be acknowledged. Work on reform of this scale requires marshalling bureaucratic support and financial resources. Gary Posen made sure that both were in supply and his steady hand is evidenced in the progress of the Task Force's work over the last ten months.

To each and every one, a special thanks. Your contribution to the development of the Ontario Environmental Bill of Rights has been invaluable.

Michael G. Cochrane
Co-chair, Task Force on the
Ontario Environmental Bill of Rights

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